58

(1) Supreme Court, U.S.
FILED

06 1 6 8 0 JUN 1 5 2007

OFFICE OF THE CLERK

No. __-___

In the

Supreme Court of the United States

Richard ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

v.

Daniel SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

June 15, 2007

QUESTION PRESENTED

(Capital Case)

In *Pace v. DiGuglielmo*, this Court held that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In a 1-page precedential opinion, the Eleventh Circuit ruled below, without any analysis, that the holding in *Pace* simply does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit – even where, as here, the time bar is both invoked and enforced. The question presented is whether the Eleventh Circuit's decision should be reversed because it impermissibly ignores the plain language of this Court's opinion in *Pace* and frustrates AEDPA's statutory purposes.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. Facts and State-Court Proceedings 3

B. Federal-Court Proceedings 5

1. "*Siebert I*" 5

2. "*Siebert II*" 7

REASONS FOR GRANTING THE WRIT 10

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PACE V. DIGUGLIELMO*. 10

I. *Pace* Expressly Holds That An Untimely State Post-Conviction Petition Is Not "Properly Filed" For AEDPA Purposes And Thereby Supersedes *Siebert I*. 12

A. This Court In *Pace* Used Unconditional Language To Make Clear That, No Matter The Circumstances, An Untimely State Post-Conviction Petition Is Not "Properly Filed." 13

B. This Court In *Pace* Pointed Specifically To Alabama Rule 32.2(c)'s Time Bar As An Example Of A "Proper[] Fil[ing]" Condition..... 15

II. The Eleventh Circuit's Holding In *Siebert II* That *Pace* Applies Only To Jurisdictional Statutes Of Limitation, And Not To Those That "Operate[] As An Affirmative Defense," Is Indefensible. 17

A. The Eleventh Circuit's Holding Directly Conflicts With The Plain Language Of This Court's Opinions In *Pace* and *Artuz v. Bennett*..... 18

B. The Eleventh Circuit's Holding Undermines The Purposes That Animate AEDPA's Limitations And Tolling Provisions. 20

C. The Eleventh Circuit's Holding Defies Common Sense..... 21

III. The Eleventh Circuit's Decision Implicates A Question Of National Importance. 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alexander v. State, 2007 WL 1309605 (Kan. Ct. App. May 4, 2007) 26

Arbaugh v. Y&H Corp., 126 S. Ct. 1235 (2006) 24

Arkansas v. Sullivan, 532 U.S. 769 (2001) 2

Artuz v. Bennett, 531 U.S. 4 (2000) ..... passim

Ballanger v. Commonwealth, 2003 WL 21472662 (Ky. Ct. App. June 27, 2003) 26

Bell v. Cone, 543 U.S. 447 (2005) 2

Benton v. State, 925 S.W.2d 401 (Ark. 1996) 29

Blackwell v. State, __ N.W.2d __, 2007 WL 914074 (Iowa Ct. App. Mar. 28, 2007) 26

Bowling v. Commonwealth, 964 S.W.2d 803 (Ky. 1998) 27

Carey v. Saffold, 536 U.S. 214 (2002) 28

Carlisle v. United States, 517 U.S. 416 (1996) 24

Carter v. State, 522 S.E.2d 342 (S.C. 1999) 27

Clem v. State, 81 P.3d 521 (Nev. 2003) 29

Cole v. State, 15 P.3d 820 (Idaho 2000) 26

Coleman v. McCaughtry, 714 N.W.2d 900 (Wisc. 2006) 28

Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (1999) 16

Corcoran v. State, 845 N.E.2d 1019 (Ind. 2006) 29

Davis v. State, 443 N.W.2d 707 (Iowa 1989) 26

Davis v. United States, 417 U.S. 333 (1974) 11

Day v. McDonough, 126 S. Ct. 1675 (2006) 24

Diep v. State, 748 A.2d 974 (Me. 2000) 27

Duncan v. Walker, 533 U.S. 167 (2001) 21

Early v. Packer, 537 U.S. 3 (2002) 2

Eberhart v. United States, 126 S. Ct. 403 (2005) 24

Evans v. Chavis, 127 S. Ct. 846 (2006) 22

Ex parte Siebert, 562 So. 2d 600 (Ala. 1990), *cert. denied, Siebert v. Alabama*, 498 U.S. 963 (1990) 3

Ex parte Siebert, 778 So. 2d 857 (Ala. 2000) 5

Ex parte Ward, __ So. 2d __, 2007 WL 1576054 (Ala. June 1, 2007) 7

Finn v. United States, 123 U.S. 227 (1887) 25

Flute v. Class, 559 N.W.2d 554 (S.D. 1997) 27

Frausto v. State, 966 P.2d 849 (Utah 1998) 27

Gonzales v. Thomas, 126 S. Ct. 1613 (2006) 2

Greene v. State, 2007 WL 1215022 (Apr. 25, 2007) 30

Hines v. Kuplinski, 591 S.E.2d 692 (Va. 2004) 29

Holland v. Jackson, 542 U.S. 934 (2004) 2

Horn v. Banks, 536 U.S. 266 (2002) 2

Hurth v. Mitchum, 400 F.3d 857 (11th Cir. 2005) 7, 17

In re Clark, 21 Cal. Rptr. 2d 509 (Cal. 1993) 26

In re Robbins, 77 Cal. Rptr. 2d 153 (Cal. 1998) 26

James v. Galetka, 965 P.2d 567 (Utah Ct. App. 1998) 28

Jenner v. Dooley, 590 N.W.2d 463 (S.D. 1999) 27

Johnson v. State, 134 P.3d 1133 (Utah 2006) 27

Johnson v. State, 2007 WL 570182 (Kan. Ct. App. Feb. 23, 2007) 26

Jones v. State, 233 N.W.2d 441 (Wisc. 1975) 28

Justice v. Commonwealth, 2006 WL 73456 (Ky. Ct. App. Apr. 12, 2006) 26

Kane v. Garcia Espitia, 546 U.S. 9 (2005) 2

Kirkland v. State, 149 P.3d 819 (Idaho 2006) 26

Klay v. All Defendants, 389 F.3d 1191 (11th Cir. 2004) 11

Kontrick v. Ryan, 540 U.S. 443 (2004) 24, 25

Kost v. State, 356 N.W.2d 680 (Minn. 1984) 27

Kuenzel v. Allen, __ F.3d __, 2007 WL 1695110 (June 13, 2007) 11

Middleton v. McNeil, 541 U.S. 433 (2004) 2

Mitchell v. Esparza, 540 U.S. 12 (2003) 2

Nelson v. State, 2003 WL 1731624 (Alaska Ct. App. Apr. 2, 2003) 25

Pace v. DiGuglielmo, 544 U.S. 408 (2005) ..... passim

Palmer v. State, 854 P.2d 955 (Or. Ct. App. 1993) 27

Peña v. State, 100 P.3d 154 (Mont. 2004) 29

People v. Boclair, 789 N.E.2d 734 (Ill. 2002) 26

People v. Kilgore, 992 P.2d 661 (Colo. Ct. App. 1999) 26

People v. Lanford, 867 P.2d 50 (Colo. Ct. App. 1993) 26

People v. Shackelford, 851 P.2d 218 (Colo. Ct. App. 1993) 26

Rhines v. Weber, 544 U.S. 269 (2005) 21

Scarborough v. Principi, 541 U.S. 401 (2004) 24

Schriro v. Landrigan, 127 S. Ct. 1933 (2007).....21

Schriro v. Smith, 546 U.S. 6 (2005).....2

Scott v. State, 2006 WL 3740876 (Kan. Ct. App. Dec. 15, 2006).....26

Siebert v. Allen, 127 S. Ct. 1823 (2007).....5

Siebert v. Allen, 455 F.3d 1269 (11th Cir. 2006).....5, 17

Siebert v. Allen, 480 F.3d 1089 (11th Cir. 2007).....passim

Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003)...passim

Siebert v. State, 562 So. 2d 586 (Ala. Crim. App. 1989).....3

Siebert v. State, 778 So. 2d 842 (Ala. Crim. App. 1999).....3, 4, 5

State v. Afanador, 697 A.2d 529 (N.J. 1997).....27

State v. Allen, 1990 WL 1104263 (Del. Super. Jan. 24, 1990).....28

State v. Biddings, 2005 WL 1482875 (Ohio Ct. App. June 23, 2005).....29

State v. Celestine, 894 So. 2d 1197 (La. Ct. App. 2005).....29

State v. Dickens, 602 A.2d 95 (Del. Super. 1989).....28

State v. Felton, 2005 WL 1342213 (Wisc. Ct. App. June 7, 2005).....28

State v. Herbstman, 974 P.2d 177 (N.M. Ct. App. 1998).....29

State v. Pantusco, 2006 WL 1549687 (N.J. App. Div. June 8, 2006).....27

State v. Smith, 2007 WL 1053335 (Minn. Ct. App. Apr. 10, 2007).....27

State v. Watson, 2002 WL 1652293 (Del. Super. July 19, 2002).....28

Sullivan v. State, 96 P.3d 761 (Nev. 2004).....29

United States v. Levy, 416 F.3d 1273 (11th Cir. 2005).....6

Walters v. State, 933 So. 2d 313 (Miss. Ct. App. 2006).....29

Wensman v. State, 342 N.W.2d 150 (Minn. 1984).....27

White v. Murtha, 377 F.2d 428 (5th Cir. 1967).....10

Wilcox v. Florida Dep't of Corr., 158 F.3d 1209 (11th Cir. 1998).....5

Woodford v. Garceau, 538 U.S. 202 (2003).....21

Woodford v. Visciotti, 537 U.S. 19 (2002).....2

Yarborough v. Gentry, 540 U.S. 1 (2003).....2

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).....24

STATUTES

28 U.S.C. §1254(1).....1

28 U.S.C. §2244(d).....8, 19

28 U.S.C. §2244(d)(1).....2, 5, 17, 27

28 U.S.C. §2244(d)(2).....passim

Alaska Stat. §12.72.020(a)(3).....25

D.C. Code §23-110.....30

Minn. Stat. §590.01 subd. 4(a).....27

N.C. Gen. Stat. §15A-1415(a).....29

N.C. Gen. Stat. §15A-1419(a)-(b).....29

N.D. Cent. Code §29-32.1-03.....30

N.H. Rev. Stat. §534:1 *et seq.*.....30

N.Y. Crim. Proc. §440.10 30

Neb. Rev. Stat. §29-3001 30

42 Pa. Cons. Stat. § 9543(a) 16

42 Pa. Cons. Stat. § 9545(b) 15, 16

O.C.G.A. §9-14-42(c) 28

22 Okla. St. Ann. §1089(D)(1) 29

R.I. Gen. Laws §10-9.1-3 30

13 Vt. Stat. Ann. §7131 30

W. Va. Code §53-4A-1 30

OTHER AUTHORITIES

Am.Jur.2d *Limitation of Actions* (Apr. 2007) 25

C.J.S. *Limitations of Actions* (Apr. 2007) 25

C. Wright, A. Miller, *et al.*, *Federal Practice & Procedure* (3d ed. 2004) 24

C. Wright, A. Miller, *et al.*, *Federal Practice & Procedure* (2d ed. 2002) 10, 11

Moore's Federal Practice (2007) 11

R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* (8th ed. 2002) 9, 23

RULES

Fed. R. Civ. P. 8(c) 24

Fed. R. Civ. P. 12(b) 24

Fed. R. Crim. P. 33 24

Sup. Ct. R. 10(c) 10

Sup. Ct. R. 13.3 1

Eleventh Cir. R. 36-3 I.O.P. 2 11

Ala. R. Crim. P. 32.2(c) ..... passim

Hawaii St. Penal P. Rule 40 30

Md. Crim. Proc. §7-103 29

Md. Crim. Proc. §7-201 29

Mass. R. Crim. P. 30 30

Pa. Rule Crim. Proc. 901(A) 15

OPINIONS BELOW

The September 30, 2002 decision of the United States District Court for the Northern District of Alabama dismissing Daniel Siebert's federal habeas corpus petition as untimely is not reported. It is reproduced at App. 2a-24a.

The June 23, 2003 decision of the Eleventh Circuit vacating the district court's limitations-based dismissal is reported at *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003), and is reproduced at App. 25a-48a.

The February 9, 2006 decision of the United States District Court for the Northern District of Alabama again dismissing Siebert's federal habeas corpus petition as untimely is not reported. It is reproduced at App. 49a-66a.

The March 7, 2007 decision of the Eleventh Circuit again vacating the district court's limitations-based dismissal is reported at *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007), and is reproduced at App. 1a.

The April 30, 2007 order of the Eleventh Circuit denying the State's petition for rehearing en banc is not reported. It is reproduced at App. 67a.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered the decision that is the subject of this petition for certiorari on March 7, 2007. *See* App. 1a. The Eleventh Circuit denied the State's timely petition for rehearing en banc on April 30, 2007. *See* App. 67a. This petition is timely because it is filed within 90 days of the order refusing en banc rehearing. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2244(d)(1) of Title 28 of the United States Code provides, in relevant part: "A 1-year period of

limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1).

2. Section 2244(d)(2) of Title 28 of the United States Code provides, in relevant part: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2).

INTRODUCTION

In the decision below, the Eleventh Circuit (Barkett, J., joined by Tjoflat and Wilson, JJ.)) held, in a summary – but precedential – opinion, that a state post-conviction petition that all agree was untimely filed (and, indeed, that was dismissed by the state courts specifically for having been untimely filed) was, despite its lateness, "properly filed" within the meaning of AEDPA's tolling provision, 28 U.S.C. §2244(d)(2). That holding is directly contrary to, and irreconcilable with, this Court's decisions in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Artuz v. Bennett*, 531 U.S. 4 (2000). Given the "obvious[ness]" of the Eleventh Circuit's error, this Court should grant the petition for certiorari and summarily reverse. *Gonzales v. Thomas*, 126 S. Ct. 1613, 1614 (2006). *See also, e.g., Horn v. Banks*, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision "directly contravene[s]" Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent").[1] Alternatively, and in view

[1] This Court has not hesitated to summarily reverse lower-court decisions misapplying the AEDPA-amended federal habeas statute. *See, e.g., Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Schriro v. Smith*, 546 U.S. 6 (2005); *Bell v. Cone*, 543 U.S. 447 (2005); *Holland v. Jackson*, 542 U.S. 934 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002).

of the fact that the logic of the Eleventh Circuit's decision – which distinguishes jurisdictional from defensive time bars for *Pace* purposes – has the potential to foreclose *Pace*'s application in as many as half the States in the country, this Court should grant the petition and set the case for briefing and argument.

STATEMENT OF THE CASE

A. Facts and State-Court Proceedings

In 1987, Daniel Siebert was convicted of capital murder and sentenced to death for killing Linda Jarman, the "hearing-impaired friend and next door neighbor" of Sherri Weathers, whom (along with her two young sons) Siebert had also murdered. *Siebert v. State*, 778 So. 2d 842, 843 (Ala. Crim. App. 1999). Siebert's conviction and sentence pertaining to the Jarman murder were affirmed on direct appeal, *see Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989), *aff'd, Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990), *cert. denied, Siebert v. Alabama*, 498 U.S. 963 (1990), and the certificate of judgment issued on May 22, 1990, *see Siebert*, 778 So 2d at 846.

Siebert filed a post-conviction ("Rule 32") petition in state circuit court – but not until August 25, 1992, several months after the expiration of the then-applicable two-year statute of limitations, *see* Ala. R. Crim. P. 32.2(c), which runs from the issuance of the certificate of judgment. *Siebert*, 778 So. 2d at 846.[2] The State answered Siebert's Rule 32 petition and, at least initially, did not raise a timeliness objection. *Id.*

---

[2] At the time, Rule 32.2(c) stated, in pertinent part, that "the court shall not entertain any petition" on specified grounds "unless the petition is filed ... within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals ...." Ala. R. Crim. P. 32.2(c). Effective August 1, 2002, the rule was amended to shorten the filing deadline to one year; otherwise, the text of the rule remained unchanged.

On the second day of the state-court evidentiary hearing, the State amended its answer and "requested for the first time that the petition[] be denied pursuant to Rule 32.2(c) because the two-year limitations period allowed for filing a Rule 32 petition had expired." *Id.* Siebert sought and received the circuit court's permission to respond to the State's timeliness argument. R32, Vol. 7, p. 148-52.[3] "Out of an abundance of caution, the circuit court continued to hear Siebert's arguments" on the merits. *Siebert*, 778 So. 2d at 846. In doing so, however, the circuit court made clear that it was not suggesting that the State had waived the Rule 32.2(c) time bar. R32, Vol. 7, pp. 151-52.

Siebert subsequently responded in writing to the State's invocation of Rule 32.2(c)'s statute of limitations. R32, Vol. 3, p. 552. As relevant for present purposes, Siebert contended that the State had "waived its affirmative defense" of untimeliness "by failing to raise it in its first responsive pleading." *Id.* at 554.[4]

In its written order, the circuit court expressly rejected Siebert's waiver argument and held that the State "did not waive the statute of limitations defense by failing to raise it in its first responsive pleading." R32, Vol. 5, p. 879. Accordingly, the circuit court dismissed Siebert's Rule 32 petition as being "untimely filed pursuant to Rule 32.2(c) of the Alabama Rules of Criminal Procedure." *Id.* at 878. "In the alternative," the court ruled that Siebert's claims were "without merit." *Id.* at 881.

---

[3] "R32" refers to the record compiled for post-conviction Rule 32 proceedings in state court.

[4] Siebert also argued (1) that the Rule 32 statute of limitations commenced not with the issuance of the certificate of judgment on May 22, 1990, but, rather, with this Court's denial of certiorari on direct appeal on November 5, 1990, and (2) that his failure to file on time was the result of "excusable neglect." R32, Vol. 3, pp. 558-64. The state courts rejected those arguments, *see* R32, Vol. 5, pp. 880-81; *Siebert*, 778 So. 2d at 848-49, and they have no bearing on the issues currently before this Court.

The Alabama Court of Criminal Appeals affirmed exclusively on statute-of-limitations grounds. Its reasoning was straightforward: Because "the certificate of judgment ... was issued on May 22, 1990," "[p]ursuant to Rule 32.2(c), Siebert's petition, filed August 25, 1992, was untimely." 778 So. 2d at 847. The appellate court expressly refused to address the merits of Siebert's time-barred claims, *see id.* at 846, and, further, expressly rejected Siebert's various efforts to avoid Rule 32.2(c), including his assertion that the State had waived the limitations bar by not pleading it initially, *see id.* at 847 ("Claim 2, asserting that Rule 32.2(c) must be raised as an affirmative defense in the first responsive pleading or it is waived, is without merit."). The Alabama Supreme Court denied Siebert's petition for certiorari. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000).

B. Federal-Court Proceedings

1. "*Siebert I*"

a. *District Court.* Siebert filed the federal habeas corpus petition that underlies this action in the United States District Court for the Northern District of Alabama on September 14, 2001. Doc. 1.[5] The State moved to dismiss the petition on the ground that it was time-barred under AEDPA's one-year statute of limitations, codified at 28 U.S.C. §2244(d)(1). The district court found that absent tolling, AEDPA's limitations period would have expired on April 23, 1997, at the conclusion of the one-year grace period applicable to petitioners whose convictions became final before the statute's enactment. App. 6a (citing *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209 (11th Cir. 1998)). The timeliness of Siebert's federal habeas petition, therefore, depended entirely

[5] On the same date, Siebert filed a separate federal habeas petition pertaining to the Weathers murder convictions (*see supra* at 3) in the United States District Court for the Middle District of Alabama. The Eleventh Circuit recently concluded that the claims in that petition were procedurally defaulted, *Siebert v. Allen*, 455 F.3d 1269 (11th Cir. 2006), and this Court denied certiorari, *Siebert v. Allen*, 127 S. Ct. 1823 (2007).

on whether Siebert could avail himself of 28 U.S.C. §2244(d)(2), which tolls AEDPA's limitations period during the time in which a petitioner has a "properly filed" state post-conviction petition pending. App. 7a. With respect to that question, the district court observed that "the state courts [had] determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed" and concluded that under the applicable law (including this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)) an untimely state post-conviction petition is not "properly filed" within the meaning of §2244(d)(2) so as to toll AEDPA's one-year statute. App. 8a-12a, 13a. The district court found itself "compelled" to conclude that "the untimely state petition was not a 'properly filed application' capable of tolling the limitation period" and, therefore, "to dismiss [Siebert's] habeas petition as time-barred under §2244(d)(1)." App. 13a.[6]

b. *Eleventh Circuit.* An Eleventh Circuit panel (the same panel that issued the decision that is the subject of this petition) vacated the district court's limitations-based dismissal and remanded for further proceedings. App. 25a-48a (*Siebert v. Campbell*, 334 F.3d 1018, 1032 (11th Cir. 2003) ("*Siebert I*")). The court of appeals held that Siebert's federal habeas petition was timely because, the court said, AEDPA's one-year statute had been tolled during the pendency of Siebert's state Rule 32 petition. Even though Siebert's Rule 32 petition had itself been filed late – and, indeed, had been dismissed by the state courts specifically on lateness grounds – the Eleventh Circuit found that it had been "properly filed" within the meaning of §2244(d)(2). App.

---

[6] The district court rejected any contention that equitable tolling applied. App. 14a-16a. Siebert never sought review of that determination, either in the Eleventh Circuit in *Siebert I*, on remand to the district court, or on return to the Eleventh Circuit in what we are calling *Siebert II* (*see infra* at 7-9). Equitable tolling, therefore, is no longer at issue in this case. *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (holding that arguments not raised in appellant's opening brief are waived).

47a. In so holding, the Eleventh Circuit started from the premise (which it sought to draw out of *Artuz*) that "[c]ompliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular claim (or all claims)." App. 34a. In other words, the court of appeals determined, compliance with an applicable state statute of limitations is not – typically, anyway – a "proper[] fil[ing]" requirement as that term is used in §2244(d)(2). More specifically, the court held that because at the time Siebert filed his post-conviction petition Rule 32.2(c)'s time-bar was not jurisdictional, "timeliness was not a prerequisite to filing *per se*." App. 44a; *accord id.* at 36a (looking to Rule 32.2(c)'s "jurisdictional character"); *id.* at 37a ("jurisdictional character"); *id.* at 38a ("jurisdictional character"). Succinctly stated, *Siebert I* held "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(2) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth v. Mitchem*, 400 F.3d 857, 861 (11th Cir. 2005) (citing *Siebert I*, 334 F.3d at 1032).[7]

2. *"Siebert II"*

a. *District Court.* Following the Eleventh Circuit's remand to the district court, Siebert's federal habeas proceeding lay dormant for a period of months. Then, promptly on the heels of this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), which held, quite contrary to *Siebert I*, that an untimely state post-conviction petition is *not* "properly filed" for AEDPA tolling purposes, the State renewed its motion to dismiss. The State contended that *Pace* had effectively overruled and superseded *Siebert I*

---

[7] The Alabama Supreme Court recently confirmed that "the limitations provision of Rule 32.2(c) is an affirmative defense and not a jurisdictional bar." *Ex parte Ward*, __ So. 2d __, __, 2007 WL 1576054, at *7 (Ala. June 1, 2007).

and urged the district court to dismiss Siebert's habeas petition as untimely under §2244(d). The district court did so.

The district court observed that in *Pace* this Court had held "that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 55a. Specifically, the district court emphasized that this Court had "stated simply: '[W]e hold that time limits, *no matter their form*, are "filing" conditions.'" *Id.* (quoting *Pace*, 544 U.S. at 417). The district court also highlighted the *Pace* Court's unqualified statement "that, when the state courts hold that a post-conviction petition is untimely under state law, '"that is the end of the matter" for purposes of §2244(d)(2).'" App. 57a (quoting *Pace*, 544 U.S. at 414). Because, the district court held, the Alabama courts here "determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed," the petition was not, under the plain language of *Pace*, "properly filed" for AEDPA tolling purposes. App. 59a.

The district court rejected any suggestion that Alabama's Rule 32.2(c) cannot be a "proper[] fil[ing]" condition because it is a defensive rather than a "jurisdictional" requirement. "Nothing in *Pace* or §2244(d)," the district court stressed, "says that only 'jurisdictional' rules constitute 'conditions to filing.'" App. 61a. By contrast, the district court observed, the *Pace* Court (1) spoke in categorical terms about *all* post-conviction time bars being "proper[] fil[ing]" requirements; (2) referenced other plainly non-jurisdictional rules (concerning, *e.g.*, forms and fees) as being filing conditions; and (3) actually pointed specifically to Alabama's Rule 32.2(c) as just the kind of rule it had in mind in holding that time bars are filing conditions. App. 61a-62a.

b. *Eleventh Circuit.* Which brings us to the decision now under review – *Siebert II.* In a 1-page summary (but published and precedential) opinion, the same Eleventh

Circuit panel that had reversed in *Siebert I* reversed yet again. App. 1a (*Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007) ("*Siebert II*")). In so doing, it decided an issue of exceptional importance with little more than a wave of the hand. After restating its earlier holding in *Siebert I* that, despite its acknowledged (and adjudicated) untimeliness, Siebert's Rule 32 petition had been "properly filed" within the meaning of §2244(d)(2) "so that his one year federal statute of limitations was tolled, making his federal petition timely," the Eleventh Circuit observed that, on remand, the district court had concluded that this Court's intervening decision in *Pace* had "superseded" and effectively overruled *Siebert I*. *Id.* The Eleventh Circuit, however, refused to "revisit[its] opinion in *Siebert I* in light of *Pace*." *Id.* Instead, in a single stroke, and without a shred of analysis or explanation, the court of appeals announced its holding as follows: "We find that the law of the case applies, noting that *Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that operated as an affirmative defense." *Id.* In other words, the Eleventh Circuit held that the rule of *Pace* – that an untimely state post-conviction petition is, by definition, not "properly filed" for AEDPA tolling purposes – applies *only* where the pertinent state time bar is jurisdictional, rather than defensive, in nature.[8]

The Eleventh Circuit's decision is indefensible. It should be reversed.

---

[8] The court of appeals remanded Siebert's federal habeas petition to the district court for procedural-bar and merits determinations – determinations that necessarily presume the timeliness of the petition itself. App. 1a. The Eleventh Circuit's remand is "no impediment to certiorari" because "the opinion of the court below has decided an important issue, otherwise worthy of review, and [this Court's] intervention may serve to hasten or finally resolve the litigation." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.18, at 260 (8th ed. 2002) (collecting cases).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari (and either summarily reverse or set the case for briefing and argument) because the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, in the pages that follow, we will demonstrate (1) that this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), clearly supersedes *Siebert I*; (2) that the Eleventh Circuit's effort in *Siebert II* to deny *Pace*'s application to non-jurisdictional, defensive time bars flouts *Pace*'s plain language, AEDPA's underlying purposes, and common sense; and (3) that the Eleventh Circuit's strained reading of *Pace* implicates a question of national importance.

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PACE V. DIGUGLIELMO*.

Before jumping into the petition proper, there is one important preliminary point: The Eleventh Circuit's reference to the "law of the case" doctrine does not in any way shield its substantive determination concerning *Pace*'s applicability from this Court's review. The "law of the case" to which the court of appeals referred, of course, was *Siebert I*. But the very question presented here is whether, as the State has argued and the district court found, this Court's intervening decision in *Pace* supersedes *Siebert I*. Because by its own terms the law-of-the-case doctrine does not apply where "'controlling authority has since made a contrary decision of the law,'" C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 670 (2d ed. 2002) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)), the *Pace* and law-of-the-case issues are simply two sides of the same coin.[9] By invoking the law-of-the-case

[9] Indeed, Professors Wright and Miller emphasize that "[p]erhaps the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of

doctrine, the Eleventh Circuit, as its opinion makes clear, *necessarily* held that *Pace* does not apply to any state post-conviction time bar that "operate[s] as an affirmative defense." App. 1a. If, on the flip side, *Pace* does apply, then, by definition, the law-of-the-case doctrine does not, because the Eleventh Circuit is not at liberty for any reason (law-of-the-case or otherwise) to ignore this Court's binding precedent.

Accordingly, however framed, the dispositive question here is whether *Pace* applies. The Eleventh Circuit has held, in a published opinion that binds future court panels, *see, e.g.*, *Kuenzel v. Allen*, __ F.3d __, __, 2007 WL 1695110, at *1 (June 13, 2007) (following *Siebert II*),[10] that *Pace* does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit. App. 1a. The Eleventh Circuit's decision in that respect is plainly wrong, and it should be reversed.

* * *

---

the particular case" and that, even within that subset, "[t]he easiest cases occur when the law has been changed by a body with greater authority on the issue" – for instance, "a higher court in the hierarchy of a single court system." C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 672 & n.50 (2d ed. 2002) (collecting court of appeals decisions refusing to apply law-of-the-case doctrine in the face of intervening Supreme Court authority). *Accord Moore's Federal Practice* §134.21[3][a] (2007) ("When, in the interim between the first and second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent.") (collecting cases, including *Davis v. United States*, 417 U.S. 333, 342 (1974)). The Eleventh Circuit purports to follow these established principles. *See Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (holding that the law-of-the-case doctrine does not apply where "controlling authority has been rendered that is contrary to the previous decision").

[10] *See also* Eleventh Cir. R. 36-3 I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent.").

There is no dispute here that without the benefit of statutory tolling under §2244(d)(2) Siebert's federal habeas petition would be barred as untimely. *See* App. 6a, 28a.[11] Nor is there any dispute here that Siebert's Rule 32 petition was itself untimely filed in state court: the certificate of judgment issued May 22, 1990; Siebert filed the Rule 32 petition underlying this action on August 25, 1992, several months beyond the then-applicable two-year deadline. *See supra* at 3. Nor, finally, is there any dispute here that the State invoked Rule 32.2(c)'s time bar as a basis for dismissing Siebert's Rule 32 petition and that the state courts found the petition untimely and dismissed it on that basis. *See supra* at 4-5. The question, therefore, is whether, *despite its lateness* – and, indeed, despite the state courts' unambiguous adjudications of its lateness – Siebert's Rule 32 petition was nonetheless "properly filed" within the meaning of §2244(d)(2), so as to toll the time for filing his federal habeas petition. In *Siebert I*, an Eleventh Circuit panel answered that question "yes." This Court's subsequent decision in *Pace* makes absolutely clear that, in fact, the answer is "no." Now, notwithstanding *Pace*, the same Eleventh Circuit panel has yet again answered the question "yes." The Eleventh Circuit's decision, which defies this Court's on-point precedent, cannot stand.

I. *Pace* Expressly Holds That An Untimely State Post-Conviction Petition Is Not "Properly Filed" For AEDPA Purposes And Thereby Supersedes *Siebert I*.

The argument that *Pace* overrules and supersedes *Siebert I* (whose holding the Eleventh Circuit reiterated, post-*Pace*, in *Siebert II*) is remarkably straightforward. There are two dispositive considerations. *First*, this Court in *Pace* used categorical language to make absolutely clear that, whatever the circumstances, an untimely state post-conviction petition is not "properly filed." And *second*, this Court in *Pace*

---

[11] Again, equitable tolling is no longer at issue in this case. *See supra* note 6.

actually referred specifically to Alabama's post-conviction statute of limitations as an example of a "proper[] fil[ing]" condition.

A. This Court In *Pace* Used Unconditional Language To Make Clear That, No Matter The Circumstances, An Untimely State Post-Conviction Petition Is Not "Properly Filed."

The Eleventh Circuit in *Siebert I* and this Court in *Pace* started in exactly the same place. The *Siebert I* court said that "[t]he question before [it was] whether Siebert's Alabama petition[], which [was] accepted by the courts *but ultimately found to have been filed late*, should be considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 26a (emphasis added). The Eleventh Circuit answered that question "yes." Not long thereafter, this Court asked the very same question – "whether a state postconviction petition *rejected by the state court as untimely* nonetheless is 'properly filed' within the meaning of §2244(d)(2)" – but gave precisely the opposite answer: "We conclude that it is not." 544 U.S. at 410 (emphasis added).

Indeed, time and time again, this Court in *Pace* observed – as a categorical matter – that if a state post-conviction petition is determined by the state courts to have been untimely filed, then, by definition, it is *not* "properly filed" within the meaning of §2244(d)(2):

- Initially, this Court reiterated, in no uncertain terms and without exception, what it had said in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) – namely, that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.'" *Pace*, 544 U.S. at 413.

- In the same vein, this Court in *Pace* expressly "h[e]ld" – again, using unconditional language – that "[w]hen a postconviction petition is untimely under state law, '*that*

[is] the end of the matter' for purposes of §2244(d)(2)." *Id.* at 414 (emphasis added).

- Continuing, the *Pace* Court concluded – yet again, as a *per se* matter – that "[b]ecause the state court rejected petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." *Id.* at 417.

- Wrapping up, this Court declared unqualifiedly that state post-conviction "time limits, *no matter their form*, are 'filing' conditions." *Id.* (emphasis added).

- Indeed, even the Justices who dissented in *Pace* recognized that under the Court's categorical rule, "a state application will not be deemed properly filed ... if *the [state] court ultimately determines* that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420 (Stevens, J., dissenting) (emphasis added).

Pace simply couldn't be any clearer. All nine Justices plainly understood that if a state court deems an inmate's state post-conviction petition to have been untimely filed, then, *ipso facto*, the petition is not "properly filed" for AEDPA tolling purposes. In other words, *Pace*'s plain language establishes that the only relevant question in a given case is this: Did the state courts in *this particular* case find *this particular* post-conviction petition to have been untimely filed? If the answer to that question is yes, then – wholly without regard to the form or application of the limitation period – the petition was *not* "properly filed." All here – including the Eleventh Circuit – agree that Siebert's Rule 32 petition was untimely filed, and, more importantly, that the state courts expressly so found. *See supra* at 3-5; App. 26a (Siebert's petition was "ultimately found to have been filed late"). Under the plain language of *Pace*, "that [is] the end of the matter."

Or it should have been, anyway. Instead, by *ipse dixit*, the Eleventh Circuit here (in *Siebert II*) held that the *Pace* rule simply doesn't apply to any state post-conviction statute of limitations "that operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit – again, even where, as here, the time bar is both invoked and enforced. App. 1a. That limitation is a w'ole-cloth creation. It is utterly irreconcilable with the unambiguous terms in which the *Pace* Court itself repeatedly expressed its holding. Again, the controlling question under *Pace* is whether – not how or pursuant to what kind of rule, but simply *whether* – an inmate's "state postconviction petition [was] rejected by the state courts as untimely." 544 U.S. at 410. As Siebert's case shows, a petition can be untimely, and "rejected by the state courts" as such, *see id.*, just as surely under a defensive time bar as under a jurisdictional one.

It is just not possible to square the Eleventh Circuit's decision with the plain language of *Pace*. The court of appeals' opinion ignores this Court's own words in *Pace* in favor of an exception (*i.e.*, for non-jurisdictional, defensive statutes of limitation) that none of the Members of this Court seems even to have considered, let alone embraced.

B. This Court In *Pace* Pointed Specifically To Alabama Rule 32.2(c)'s Time Bar As An Example Of A "Proper[] Fil[ing]" Condition.

In addition to this Court's categorical language, there is the fact, emphasized by the district court here, that "the Supreme Court itself, in *Pace*, identified Alabama's time bar as one of the very types of rules that constitute 'conditions to filing'" for §2244(d)(2) purposes. App. 61a. Specifically, "[a]t footnote seven, the Court ... gives examples of the types of state procedural rules that constitute 'conditions to filing,' explicitly identifying Alabama's Rule 32.2(c) time limit as one." App. 62a. *Pace*'s footnote 7 – intended to highlight the distinction between "conditions to filing" and "conditions to obtaining relief" – reads as follows:

> *Compare, e.g.*, Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth v. Fahy*, 558 Pa. 313, 328, 737 A.2d 214, 222 (1999) (describing the time limit as "jurisdictional"); 2 Ala. Rule Crim. Proc. 32.2(c) (2004-2005) (stating that a court "shall not entertain" a time-barred petition), *with* 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004-2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz*, are present).

Pace, 544 U.S. at 417 n.7.

In footnote 7, therefore, this Court expressly lumped Alabama's post-conviction statute of limitations in with Pennsylvania's, and then contrasted the two limitations periods, as §2244(d)(2) "proper[] fil[ing]" conditions, with run-of-the-mill procedural bars, which merely "go to the ability to obtain relief." *Id.* at 417. Plainly, then, this Court "considered Alabama's Rule 32.2(c) to be the type of rule that is a 'condition to filing,' violation of which would preclude the petition from being 'properly filed' for §2244(d)(2) purposes." App. 62a-63a.

Siebert's (and, implicitly, the Eleventh Circuit's) response to *Pace*'s footnote 7 is to say that that it refers to the Pennsylvania post-conviction time limit there at issue in "jurisdictional" terms. *See* C.A. Blue Br. 12, 18-19. That is true, but it misses the point entirely. The point is that the balance of footnote 7 expressly places Alabama's Rule 32.2(c) – whether technically "jurisdictional" or not – *right alongside* Pennsylvania's rule as a "proper[] fil[ing]" requirement. The point is that the Court in *Pace* singled out

Alabama's Rule 32.2(c) as the very kind of rule it had in mind when it held that state post-conviction time bars are conditions to filing and, therefore, "proper[] fil[ing]" requirements within the meaning of §2244(d)(2).

II. The Eleventh Circuit's Holding In *Siebert II* That *Pace* Applies Only To Jurisdictional Statutes Of Limitation, And Not To Those That "Operate[] As An Affirmative Defense," Is Indefensible.

The crux of the Eleventh Circuit's holding in *Siebert II* (and its effort to salvage its earlier opinion) is its assertion that "*Pace* did not address ... a statute of limitations that operated as an affirmative defense." App. 1a. Thus, even after *Pace*, the Eleventh Circuit is clearly sticking with its pre-*Pace* view "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(1) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth*, 400 F.3d at 861 (citing *Siebert I*, 334 F.3d at 1032).

Tellingly, in the Eleventh Circuit, Siebert himself expressly disavowed any suggestion that §2244(d)(2)'s application should turn on a distinction between jurisdictional and defensive statutes of limitation: "Mr. Siebert does not contend that only jurisdictional rules are conditions of filing or even that only statutes of limitations which are jurisdictional are conditions of filing." C.A. Gray Br. 18. Any such argument, he told the Eleventh Circuit, "*would conflict with* Pace." *Id.*[12] Siebert was exactly right

---

[12] That is not to say that Siebert threw in the towel before the Eleventh Circuit. Instead, before that court, Siebert objected principally that his failure to comply with Rule 32.2(c) should not preclude a finding that his post-conviction petition was "properly filed" under 2244(d)(2) because, he said, Rule 32.2(c) was not "firmly established and regularly followed" at the time he filed. *See* C.A. Blue Br. 13-15; C.A. Gray Br. *passim*. The State responded that *Pace* leaves no room for a consistent-application gloss on §2244(d)(2)'s plain language and, more importantly, that the Eleventh Circuit (indeed, the same panel in a parallel case involving

about that; the court of appeals should have heeded his warning.[13] As matters stand now, the Eleventh Circuit's decision restricting *Pace*'s application to jurisdictional time bars – and refusing its application to defensive time bars – directly conflicts with the plain language of the *Pace* opinion itself, undermines the purposes that animate AEDPA's limitations and tolling provisions, and defies common sense.

A. The Eleventh Circuit's Holding Directly Conflicts With The Plain Language Of This Court's Opinions In *Pace* and *Artuz v. Bennett*.

Is there any basis in the language of the *Pace* opinion itself for the Eleventh Circuit's imagined distinction between jurisdictional and defensive time bars? None whatsoever. It is certainly true, as we have said, that the Pennsylvania rule at issue in *Pace* was described as a "jurisdictional" time bar. *Pace*, 544 U.S. at 417 n.7. But there is absolutely *no* indication that the seemingly jurisdictional character of the Pennsylvania statute mattered to – let alone controlled – this Court's analysis or holding. Indeed, the evidence, even on the face of the opinion itself, is dispositively to the contrary.

1. As an initial matter, the categorical language of *Pace* does not distinguish between time bars that are jurisdictional and those that operate as affirmative defenses. By contrast,

---

Siebert himself) has held that Rule 32.2(c) *was* "firmly established and regularly followed" at the time Siebert filed. *Siebert v. Allen*, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (citing *Hurth v. Mitchem*, 400 F.3d 857, 863 (11th Cir. 2005)), *cert. denied*, 127 S. Ct. 1823 (2007). The consistent-application issue is thus irrelevant here. In any event, in the decision under review, the court of appeals made nothing of the consistent-application issue, and it is clear from its opinion that the Eleventh Circuit would refuse to apply *Pace* to any statute of limitations that "operate[s] as an affirmative defense," no matter how uniformly applied. App. 1a.

[13] And ours. We presented the same argument to the Eleventh Circuit that we are presenting here (C.A. Red Br. 11-20) and, particularly contended there, as here, that *Pace* cannot reasonably be read to apply only to jurisdictional time bars (C.A. Red Br. 20-22).

Pace holds, unequivocally and without exception, that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)"; that "time limits, no matter their form, are 'filing' conditions"; and that where a "state court rejected [a] petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." 544 U.S. at 414, 417. Accordingly, under *Pace*'s plain language it just doesn't matter whether a state post-conviction time bar is jurisdictional or, instead, "operate[s] as an affirmative defense." App. 1a. All that matters, as we have said, is that the state courts in *this* case found *this* post-conviction petition to have been untimely filed. In that circumstance (which clearly obtains here), the state petition was not "properly filed" for §2244(d)(2) purposes. In other words, while *Pace* may by happenstance have arisen against the backdrop of a jurisdictional time bar, it is clear from the language it chose that this Court generalized its holding, in the interest of establishing an unambiguous rule, to include *all* state-court determinations of untimeliness.[14]

2. Moreover, as the district court here correctly recognized, not only is there "[n]othing in *Pace* or §2244(d) [that] says that only 'jurisdictional' rules constitute 'conditions to filing'" but, indeed, "many of the 'conditions to filing' identified by the Supreme Court" in *Pace*'s predecessor, *Artuz v. Bennett*, 531 U.S. 4 (2000), are quite obviously *not* strictly jurisdictional. App. 61a. In *Artuz*, this Court listed four common "proper[] fil[ing]" requirements:

---

[14] Notably, this Court in *Pace* had every opportunity to limit the scope of its holding to technically jurisdictional state time bars. The respondent there repeatedly emphasized the jurisdictional character of Pennsylvania's post-conviction statute of limitations. *See* Br. of Respondent at 4-5, 7, 9-10, 12-18, 25-28, 35, *Pace* (No. 03-9627). This Court's published opinion, however, uses language that plainly applies to all state-court determinations of untimeliness, whether jurisdictional or not.

Alongside (1) "time limits upon [a petition's] delivery" (the filing condition reiterated in *Pace*), the *Artuz* Court mentioned (2) the "form of the document," (3) the "court and office in which it must be lodged," and (4) the "requisite filing fee." 531 U.S. at 8. *None* of those requirements, as the district court here understood, is "jurisdictional in the sense that the court lacks power to deal with the matter." App. 61a. Accordingly, the Eleventh Circuit's determination that only jurisdictional rules can be "proper[] fil[ing]" requirements – and, therefore, that because Rule 32.2(c)'s time bar "operated as an affirmative defense" it cannot be a filing condition – is doubly wrong: It is irreconcilable not only with *Pace* but also with *Artuz*.

B. The Eleventh Circuit's Holding Undermines The Purposes That Animate AEDPA's Limitations And Tolling Provisions.

It is not just the face of *Pace* that the Eleventh Circuit's decision here contradicts, but also *Pace*'s underlying logic. In *Pace*, this Court emphasized that "[t]he purpose of AEDPA's statute of limitations confirms th[e] commonsense" understanding that an untimely state post-conviction petition is, by definition, not "properly filed" within the meaning of §2244(d)(2). 544 U.S. at 413. Specifically, this Court was concerned that "[o]n petitioner's theory" – under which timely filing in state court would *not* have been a "proper[] fil[ing]" requirement – "a state prisoner could toll [AEDPA's] statute of limitations at will simply by filing untimely state postconviction petitions." *Id.* That, the Court said, "would turn §2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay." *Id.*

The *Pace* Court assumed that in holding that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," *id.* at 414, it had eliminated the risk that inmates would, as respondent argued there, "give themselves their own

extensions" – and thereby toll AEDPA's time bar indefinitely – merely "by filing an untimely state post-conviction petition." Brief of Respondent at 32, *Pace* (No. 03-9627). The Eleventh Circuit's decision here, however, resurrects that risk with respect to all inmates imprisoned in States (of which there are many, *see infra* at 25-30) whose post-conviction time bars are not strictly jurisdictional but, instead, "operate[] as an affirmative defense." App. 1a. In those States, an inmate may once again unilaterally extend the time for filing his federal habeas petition simply by lodging an untimely state petition – even in a case, like this one, in which (1) all agree that the state petition is time-barred, (2) the State expressly invokes the time bar, and (3) the state courts unambiguously find the petition to have been untimely filed and dismiss the petition on that basis.

That state of affairs – which follows straightaway from the Eleventh Circuit's artificial distinction between jurisdictional and defensive time bars – is irreconcilable with "AEDPA's acknowledged purpose of 'reduc[ing] delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). Worse, it is irreconcilable with the specific purpose of AEDPA's own limitations period, which is to "'restrict[] the time that a prospective federal habeas petitioner has in which to seek federal habeas review'" and thereby to "'reduc[e] the potential for delay on the road to finality.'" *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)).

C. The Eleventh Circuit's Holding Defies Common Sense.

In deciding the case the way it did – by wagering everything on a distinction between jurisdictional and defensive state time bars – the Eleventh Circuit seems to have lost sight of the fact that the point here is to interpret a statute, and that the controlling statutory term is "properly

filed." The question in this case, therefore, is whether Siebert's Rule 32 petition was "properly filed" within the meaning of §2244(d)(2). In *Pace*, this Court harked back to *Artuz*'s instruction that, in interpreting §2244(d)(2), courts should be "guided by the 'common usage' and 'commo[n] underst[anding]' of the phrase 'properly filed.'" *Pace*, 544 U.S. at 413 (quoting *Artuz*, 531 U.S. at 8, 9). In common and ordinary usage, the *Pace* Court held simply, a *late* petition is not a "properly filed" petition.

It is difficult to imagine why a state time bar's formal character as either a jurisdictional barrier or an affirmative defense should matter one whit to the statutory "proper[] fil[ing]" criterion. (And, indeed, recall that *Artuz*'s own catalogue of "proper[] fil[ing]" requirements referred only to *non*-jurisdictional rules. *See supra* at 19-20.) The fact that a state statute of limitations technically "operate[s] as an affirmative defense" (App. 1a) rather than a jurisdictional bar does not make a late-filed post-conviction petition any less late or, on the flip side, any more "proper[]." That is self-evidently true in a case like this one, where (1) all agree that the state petition was filed late, (2) the State expressly invoked the post-conviction time bar, and (3) the state courts flatly rejected any contention that the State had waived the time bar and, instead, enforced the bar by dismissing the petition. In that circumstance – the circumstance presented by this case – what possible difference could it make that the state statute of limitations was formally an affirmative defense rather than a jurisdictional barrier? The answer seems clear: none at all.[15] The Eleventh Circuit's decision

---

[15] This is not a case in which the state courts found that a State had waived a defensive time bar and, on the basis of that waiver, went on to address the merits of a state post-conviction petitioner's claims. In that instance, a State, to be sure, could not seek to un-ring the bell by contending in federal court that, despite its state-court waiver, the petitioner's state petition was technically untimely and, therefore, not "properly filed." But where, as here, the state courts explicitly reject waiver arguments, find the state petition untimely, and dismiss it on that basis, "'that [is] the end of the matter' for purposes of §2244(d)(2)."

rests on a formalistic distinction between jurisdictional and defensive statutes of limitation that has absolutely no basis in §2244(d)(2)'s "proper[] fil[ing]" criterion or in the reality of post-conviction litigation more generally.[16]

III. The Eleventh Circuit's Decision Implicates A Question Of National Importance.

The State, of course, appreciates the fact that this Court "has traditionally expended its time and resources on those cases that present issues of national importance ...." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.2, at 223 (8th ed. 2002). This is just such a case. Alabama is by no means the only State affected here. The distinction at the heart of the Eleventh Circuit's decision – between jurisdictional time bars, which, it held, are §2244(d)(2) "proper[] fil[ing]" conditions, and defensive time bars, which are not – leaves a whole host of States right back where they started before this Court decided *Pace*.

Pace, 544 U.S. at 414. *Accord id.* at 410 (looking to whether state petition was "rejected by the state court as untimely"); *id.* at 417 (looking to whether "the state court rejected petitioner's [post-conviction] petition as untimely"); *cf. Evans v. Chavis*, 127 S. Ct. 846, 852 (2006) (looking to whether state courts gave any clear indication that a particular filing "was timely or untimely").

[16] The fact that *Pace* was a closely contested, 5-to-4 decision is irrelevant at this juncture. Whatever one's view about the Court's macro-level decision there that timely filing under state law is a "proper[] fil[ing]" requirement, there is no good reason to distinguish between jurisdictional and defensive time bars in applying that rule. Indeed, in his dissent, Justice Stevens argued that "most state laws respecting untimely filings of postconviction petitions" function as waivable affirmative defenses. *Pace*, 544 U.S. at 426 (Stevens, J., dissenting). Nonetheless, he recognized that under the rule adopted by the Court, "a state application will not be deemed properly filed ... if the [state] court ultimately determines that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420. State time bars – all of them – either are or are not "proper[] fil[ing]" requirements. There is no basis, either in *Pace* or elsewhere, for including some in that category but excluding others.

First, a bit of background: As a rule, statutes of limitation are *not* jurisdictional but instead, in the Eleventh Circuit's words, "operate[] as an affirmative defense." App. 1a. Perhaps most conspicuously, the Federal Rules of Civil Procedure expressly characterize "statute[s] of limitations" as "affirmative defense[s]," Fed. R. Civ. P. 8(c), and distinguish them from jurisdictional matters, *see* Fed. R. Civ. P. 12(b), (h). *Accord* C. Wright, A. Miller, *et al.*, 5 *Federal Practice & Procedure* §1278, at 644-45 & 656 n.12 (3d ed. 2004) (observing that under Federal Rules, statute of limitations is an "affirmative defense").

So, too, even outside the standard civil-procedure context, this Court has repeatedly recognized that statutes of limitation are affirmative defenses rather than jurisdictional barriers to suit. Most recently (and relevantly), this Court made precisely that observation about AEDPA's own one-year time bar: "A statute of limitations defense ... is not 'jurisdictional.'" *Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006); *accord id.* at 1686 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitations periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional ...."). Other examples abound. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1242 (2006) ("[T]ime prescriptions, however emphatic, 'are not properly typed "jurisdictional."'"); *Eberhart v. United States*, 126 S. Ct. 403, 404-05 (2005) (Federal Rule of Criminal Procedure 33's 7-day limitation period on motions for new trials is "nonjurisdictional" affirmative "defense"); *Kontrick v. Ryan*, 540 U.S. 443, 452-60 (2004) (bankruptcy rules' 60-day timely-filing requirement is a "claim-processing rule" that is not "jurisdictional" but, rather, provides an "affirmative defense"); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (Equal Access to Justice Act's 30-day timely-filing provision is not "jurisdictional"); *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones,

under the heading 'subject matter jurisdiction.'"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (EEOC timely-filing requirement is "not a jurisdictional prerequisite" but, rather, "like a statute of limitations," an affirmative defense). Indeed, at least as far back as 1887, this Court recognized the "general rule" that a statute of limitations "does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions." *Finn v. United States*, 123 U.S. 227, 232-33 (1887).[17]

State courts likewise treat statutes of limitation as defensive rather than strictly jurisdictional. The leading legal encyclopedias agree that while "[t]he expiration of a statute of limitations is an affirmative defense that may deprive a litigant of his or her right to recover," it "is not a jurisdictional defect," 54 C.J.S. *Limitations of Actions* §14 (Apr. 2007) (collecting decisions from Arkansas, California, Idaho, Illinois, Oklahoma, Texas, and Utah), and that "a statute of limitation generally is not jurisdictional" but, rather, "must be pleaded as an affirmative defense," 51 Am.Jur.2d *Limitation of Actions* §20 (Apr. 2007) (collecting decisions from Arizona, Arkansas, Colorado, Missouri, Rhode Island, and Utah).

Which brings us to state post-conviction time bars, specifically. That, of course, is where the rubber truly meets the road here. Against the foregoing backdrop, it is altogether unsurprising that our research indicates that, in addition to Alabama, at least 16 States treat their state post-conviction statutes of limitation as affirmative defenses

---

[17] In *Kontrick*, this Court emphasized that "[c]larity would be facilitated if courts and litigants would use the label 'jurisdictional' not for claim-processing rules" like timely-filing requirements, "but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) within a court's adjudicatory authority." 540 U.S. at 455.

rather than as mandatory jurisdictional barriers: Alaska,[18] California,[19] Colorado,[20] Idaho,[21] Illinois,[22] Iowa,[23] Kansas,[24]

---

[18] *See Nelson v. State*, 2003 WL 1731624, at *3-4 (Alaska Ct. App. Apr. 2, 2003) (unpublished) (observing that Alaska Statutes §12.72.020(a)(3)'s statute of limitations is "an affirmative defense" that may, in certain circumstances, be waived).

[19] *See In re Robbins*, 77 Cal. Rptr. 2d 153, 159 (Cal. 1998) (describing flexible timeliness standards inconsistent with treatment as strictly jurisdictional); *In re Clark*, 21 Cal. Rptr. 2d 509, 517-18 (Cal. 1993) (same).

[20] *See People v. Lanford*, 867 P.2d 50, 51 (Colo. Ct. App. 1993) (holding that compliance with state post-conviction time bar "is not a jurisdictional prerequisite for the review of the merits of [a petitioner's] attack"); *People v. Shackelford*, 851 P.2d 218, 221 (Colo. Ct. App. 1993) ("[F]ailure to attack the convictions in a timely manner does not implicate the jurisdiction of this court to resolve defendant's contentions."). Even after the Colorado post-conviction statute was amended in 1998 to permit (but not require) courts to notice untimeliness *sua sponte*, courts continue to recognize their discretion to entertain late petitions where the defense is not raised in the trial court. *See People v. Kilgore*, 992 P.2d 661, 662-63 (Colo. Ct. App. 1999).

[21] *See Kirkland v. State*, 149 P.3d 819, 821 (Idaho 2006) ("The statute of limitations for petitions for post-conviction relief is not jurisdictional. It 'is an affirmative defense that may be waived if it is not pleaded by the defendant.'" (quoting *Cole v. State*, 15 P.3d 820, 823 (Idaho 2000)).

[22] *See People v. Boclair*, 789 N.E.2d 734, 739-42 (Ill. 2002) (holding that state post-conviction time bar is not a "jurisdictional prerequisite" but, rather, "an affirmative defense and can be raised, waived, or forfeited by the State").

[23] *See Blackwell v. State*, __ N.W.2d __, 2007 WL 914074, at *1 (Iowa Ct. App. Mar. 28, 2007) (observing that post-conviction statute of limitations "is an affirmative defense generally raised by a responsive pleading") (citing *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989)).

[24] *See Alexander v. State*, 2007 WL 1309605, at *1 (Kan. Ct. App. May 4, 2007) (unpublished) (holding that state post-conviction time bar is "not jurisdictional, but rather an affirmative defense which must be pled"); *see also Johnson v. State*, 2007 WL 570182, at *4 (Kan. Ct. App. Feb. 23, 2007 (unpublished) ("affirmative defense"); *Scott v. State*, 2006 WL 3740876, at *4 (Kan. Ct. App. Dec. 15, 2006) (unpublished) ("affirmative defense").

Kentucky,[25] Maine,[26] Minnesota,[27] New Jersey,[28] Oregon,[29] South Carolina,[30] South Dakota,[31] Utah,[32] and Wisconsin.[33]

---

[25] *See Justice v. Commonwealth*, 2006 WL 73456, at *1-2 (Ky. Ct. App. Apr. 12, 2006) (unpublished) (holding that the state post-conviction time bar is a "statute of limitations defense [that] must be affirmatively pled" and that "a failure to do so constitutes a waiver of that defense"); *Ballanger v. Commonwealth*, 2003 WL 21472662, at *3 (Ky. Ct. App. June 27, 2003) (unpublished) (citing *Bowling v. Commonwealth*, 964 S.W.2d 803, 805 (Ky. 1998), and analogizing state post-conviction time bar to 28 U.S.C. §2244(d)(1), which, the court said, "is a statute of limitations rather than a jurisdictional bar").

[26] *See Diep v. State*, 748 A.2d 974, 975 (Me. 2000) (holding that state post-conviction time bar does not implicate "subject matter jurisdiction").

[27] *See State v. Smith*, 2007 WL 1053335 (Minn. Ct. App. Apr. 10, 2007) (unpublished) (observing that under *Kost v. State*, 356 N.W.2d 680, 682 (Minn. 1984), and *Wensman v. State*, 342 N.W.2d 150, 151 (Minn. 1984), timeliness is only a bar where the State has been prejudiced by the delay or the petitioner has abused process). The Minnesota Legislature recently enacted a 2-year post-conviction statute of limitations to replace its abuse-of-the-writ regime. *See* Minn. Stat. §590.01 subd. 4(a) (effective Aug. 1, 2005). Our research does not reveal that any court has yet characterized the new limit as either jurisdictional or defensive. Minnesota, therefore, is also appropriately placed in the "twilight zone" category, *see infra* at 28-29.

[28] See *State v. Afanador*, 697 A.2d 529, 534 (N.J. 1997) (observing that state post-conviction time bar is flexible and may be relaxed according to factors such as a petitioner's "excusable neglect" and the degree of prejudice to the State); *see also State v. Pantusco*, 2006 WL 1549687, at *4 (N.J. App. Div. June 8, 2006) (unpublished) (referring to state post-conviction statute of limitations as a "time bar defense" that State could opt not to invoke).

[29] *See Palmer v. State*, 854 P.2d 955, 956 (Or. Ct. App. 1993) (holding that state post-conviction time bar is "not a limitation on the jurisdiction of the post-conviction court" but, rather, an "affirmative defense").

[30] *See Carter v. State*, 522 S.E.2d 342, 343 (S.C. 1999) (holding that State may "agree[] that the petitioner should be allowed to" file an out-of-time application and that, if it does so, it will be "estopped from asserting the statute of limitations as a defense").

[31] *See Flute v. Class*, 559 N.W.2d 554, 557 (S.D. 1997) (observing that post-conviction statute "authorizes (but does not mandate) the dismissal" of a petition whose late filing has prejudiced the State's ability to respond); *see also Jenner v. Dooley*, 590 N.W.2d 463, 468 (S.D. 1999)

Cf. also Carey v. Saffold, 536 U.S. 214, 225 (2002) (observing that there are "many" reasons that a state post-conviction court "will sometimes address the merits of a claim that it believes was presented in an untimely way," something it couldn't do if the time bar were truly jurisdictional). In addition, a number of other States presently exist in something of a twilight zone; their courts either have not expressly said whether their post-conviction statutes of limitation are jurisdictional or defensive or have issued contradictory pronouncements on the subject: Delaware,[34] Georgia,[35] Indiana,[36] Maryland,[37] Nevada,[38] North Carolina,[39] Oklahoma,[40] and Virginia.[41]

(holding that petitioner must be given opportunity to rebut presumption of prejudice that attaches at five years).

[32] *See Johnson v. State*, 134 P.3d 1133, 1137 (Utah 2006) (holding that state post-conviction time bar "is not absolute" but, rather, contains an interests-of-justice "safety valve" allowing for the consideration of an untimely petition); *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) (holding that a hard-and-fast limitation period may never be applied to bar a habeas petition and that "proper consideration of meritorious claims raised in a habeas petition will always be in the interests of justice" for purposes of permitting the untimely filing); *cf. James v. Galetka*, 965 P.2d 567, 570-73 (Utah Ct. App. 1998) (observing that statutes of limitation, in both the civil and the criminal context, are "affirmative defenses," not prerequisites to "subject matter jurisdiction").

[33] *See Coleman v. McCaughtry*, 714 N.W.2d 900, 902, 905-08 (Wisc. 2006) (holding that state habeas petition premised on claim of ineffective assistance of appellate counsel is subject to doctrine of laches, which is "affirmative defense" with respect to which the State bears the burdens of pleading and proof); *Jones v. State*, 233 N.W.2d 441, 446 (Wisc. 1975) (holding that the court-established 90-day limit for motions to reconsider sentence is "regulatory rather than jurisdictional," that a trial court may "entertain motions beyond that time in the exercise of its discretion"). Wisconsin courts have not definitively determined whether a laches or any other timeliness defense applies to other post-conviction petitions. *See, e.g., State v. Felton*, 2005 WL 1342213, at *8 (Wisc. Ct. App. June 7, 2005) (unpublished).

[34] *Compare State v. Watson*, 2002 WL 1652293, at *1 (Del. Super. July 19, 2002) (stating that time bar is "jurisdictional," at least to the extent that it "may not be enlarged"), *with State v. Allen*, 1990 WL 1104263, at

To be sure, there are States whose courts have deemed their post-conviction time bars to be jurisdictional,[42] and

---

*1 (Del. Super. Jan. 24, 1990) (noting that State had "agreed to waive" the time bar then granting partial relief on the merits), and *State v. Dickens*, 602 A.2d 95, 99 (Del. Super. 1989) (time bar is "by no means absolute or unconditional").

[35] *See* O.C.G.A. §9-14-42(c) (1-year post-conviction time bar for misdemeanants and 4-year post-conviction time bar for felons). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[36] *See Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[37] *See* Md. Crim. Proc. §7-103 (10-year time bar in non-capital capital cases absent showing of "extraordinary cause"); *id.* §7-201 (210-day time bar in capital cases, subject to "good cause" exception). Our research did not identify any decisions definitively construing these provisions as jurisdictional or defensive in nature.

[38] *Compare Clem v. State*, 81 P.3d 521, 525 (Nev. 2003) (observing that petitioner may overcome state post-conviction time bar "with a sufficient showing of good cause and actual prejudice" and thereby suggesting that time bar is not strictly mandatory or jurisdictional), *with Sullivan v. State*, 96 P.3d 761, 764 n.6 (Nev. 2004) (suggesting, in footnote, that State could not "stipulate" that post-conviction petition was timely).

[39] *See* N.C. Gen. Stat. §15A-1415(a) (120-day post-conviction time bar in capital cases); *id.* §15A-1419(a)-(b) (denial warranted on basis of untimeliness, subject to "good cause" and "miscarriage of justice" exceptions). Our research did not identify any decisions definitively construing the time bar as jurisdictional or defensive in nature.

[40] *See* 22 Okla. St. Ann. §1089(D)(1) (90-day post-conviction time bar in capital cases). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[41] *See Hines v. Kuplinski*, 591 S.E.2d 692 (Va. 2004) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[42] *See Benton v. State*, 925 S.W.2d 401, 402 (Ark. 1996) ("The time limitations imposed in Rule 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief which is not properly filed."); *State v. Celestine*, 894 So. 2d 1197, 1198 (La. Ct. App. 2005) (post-conviction time bar is "jurisdictional"); *Walters v. State*, 933 So. 2d 313, 315 (Miss. Ct. App. 2006) (dicta) (post-conviction

there are a few others that do not presently impose time limitations on post-conviction filings.[43] The point remains, however, that even as matters stand now, the rationale of the Eleventh Circuit's decision here – refusing to apply *Pace* to any state post-conviction time bar that is not strictly jurisdictional in nature – effectively nullifies *Pace*'s clear holding in as many as half the States in the country. It is inconceivable that, having expressly held that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," 544 U.S. at 414, this Court in *Pace* intended – silently – to exempt an entire class of state time bars from that categorical rule.

CONCLUSION

The Eleventh Circuit's decision is both plainly wrong and, in real-world terms, quite significant. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

---

time bar is "jurisdiction[al]"); *Peña v. State*, 100 P.3d 154, 163 (Mont. 2004) (post-conviction time bar is "jurisdictional" and "cannot be waived by the State"); *State v. Herbstman*, 974 P.2d 177, 179 (N.M. Ct. App. 1998) (post-conviction time bar "jurisdictional"); *State v. Biddings*, 2005 WL 1482875, at *1-2 (Ohio Ct. App. June 23, 2005) (post-conviction time bar "jurisdiction[al]"); *Greene v. State*, 2007 WL 1215022, at *5 (Apr. 25, 2007) (post-conviction time bar "jurisdictional").

[43] *See* D.C. Code §23-110; Hawaii St. Penal P. Rule 40; Mass. R. Crim. P. 30; Neb. Rev. Stat. §29-3001; N.H. Rev. Stat. §534:1 *et seq.*; N.Y. Crim. Proc. §440.10; N.D. Cent. Code §29-32.1-03; R.I. Gen. Laws §10-9.1-3; 13 Vt. Stat. Ann. §7131; W. Va. Code §53-4A-1.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

June 15, 2007

APPENDIX

United States Court of Appeals, Eleventh Circuit.
Daniel SIEBERT, Petitioner-Appellant,
v.
Richard F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent-Appellee.
No. 06-11841.

March 7, 2007.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

BARKETT, Circuit Judge:

Daniel Siebert filed a federal habeas petition pursuant to 28 U.S.C. § 2254 on September 14, 2001 challenging the validity of his conviction and sentence for the murder of Linda Jarman. The district court dismissed it as being untimely filed pursuant to 28 U.S.C. § 2244(d). This court reversed and remanded, finding that his state petition had been properly filed so that his one year federal statute of limitations was tolled, making his federal petition timely. We thus remanded for further proceedings. *Siebert v. Campbell,* 334 F.3d 1018 (11th Cir.2003) ("*Siebert I*"). However, instead of further proceedings, the district court revisited the timeliness issue and again dismissed the petition as untimely, finding that *Pace v. DiGuglielmo,* 544 U.S. 408, 125 S. Ct. 1807, 161 L.Ed.2d 669 (2005), superseded our decision in *Siebert I.* We find that the law of the case applies, noting that *Pace* did not address the question presented in *Siebert I,* to wit: a statute of limitations that operated as an affirmative defense. However, rather than continuing piecemeal litigation and revisiting our opinion in *Siebert I* in light of *Pace,* we again reverse and remand for further proceedings, including questions of procedural bar and the resolution of claims which were exhausted on direct appeal.

REVERSED AND REMANDED.

FILED 02 SEP 30 PM 2:02
U.S. DISTRICT COURT
N.D. OF ALABAMA

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DANIEL SIEBERT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-J-2323-E
	)	
MICHAEL HALEY,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
and the ATTORNEY GENERAL	)	
OF THE STATE OF	)	
ALABAMA,	)	
	)	
Respondents.	)	

ENTERED
SEP 30 2002

MEMORANDUM OPINION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Talledega County Circuit Court on March 19, 1987, for capital murder, for which he was sentenced to death. The petitioner, Daniel Siebert,[1] with the assistance of an attorney, filed the instant petition for writ

[1] In all trial court proceedings, the petitioner's first name is spelled "Danial," but the appellate courts and petitioner's counsel, in the petition for writ of *habeas corpus* filed here, spells the name as "Daniel."

of *habeas corpus* on September 14, 2001. He is incarcerated on Death Row at Holman Correctional Facility in Atmore, Alabama.

I. PROCEDURAL HISTORY

On March 19, 1987, the petitioner was convicted after a jury trial for the capital murder of Linda Ann Jarman[2] during the course of a robbery.[3] The jury recommended that petitioner be sentenced to death, and on April 17, 1987, the trial judge sentenced petitioner to death by electrocution.

Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed on April 14, 1989. *Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989). On March 30, 1990, the Alabama Supreme Court affirmed the decision of the appellate court. *Siebert v. State*, 562 So. 2d 600 (Ala. 1990). A certificate of judgment was issued by the Alabama Court of Criminal Appeals on May 22, 1990. The court did not send a copy to the petitioner, but did send a copy to the Talladega County Circuit Court. On November 5, 1990, the United States Supreme Court denied petitioner's application for writ of *certiorari*. *Siebert v. Alabama*, 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 408 (1990).

On or about August 25, 1992,[4] petitioner filed a petition for post-conviction relief in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.[5] The state

---

[2] The victim's name is spelled "Jarmin" in some state court documents.

[3] In a separate trial held in Lee County after a motion for change of venue was granted in the Talladega Circuit Court, Siebert subsequently was convicted of capital murder in connection with the strangulation deaths of Sherri Weathers and her two young sons.

[4] The parties refer to the filing date as August 24, 1995. The document attached as defendants' Exhibit 36 shows a date stamp of August 25, 1995. The precise date is not relevant, however, to the ultimate resolution of this matter.

[5] The Rule 32 petition arising from his conviction for the murder of Jarman was ultimately consolidated in Talledega Circuit Court with the

filed an answer on October 15, 1992, and did not raise the defense that the petition was time-barred. The trial court conducted evidentiary hearings on petitioner's claims of ineffective assistance of counsel on April 3-5, 1995, and on September 26, 1995. On April 4, 1995, the state amended its answer and raised for the first time the defense that the petition was untimely filed. On December 30, 1998, the court ruled that the Rule 32 petition was untimely filed pursuant to Alabama Rule of Criminal Procedure 32.2(c). The court also addressed the petition on the merits and denied all claims. Petitioner appealed to the Alabama Court of Criminal Appeals, which affirmed the denial on December 30, 1999. *Siebert v. State*, 778 So. 2d 842 (1999). The Alabama Supreme Court denied *certiorari* on September 15, 2000, 778 So. 2d 857 (Ala. 2000). Petitioner did not seek review in the United States Supreme Court.

On September 14, 2001, the petitioner, represented by counsel, filed the instant *habeas corpus* petition. Petitioner filed an amended petition on October 26, 2001. On February 5, 2002, the respondents filed an answer and a motion to dismiss supported by a memorandum of law, contending that the petition is time-barred by operation of 28 U.S.C. § 2244(d)(1).[6] On March 20, 2002, respondents filed a supplemental memorandum of law. Petitioner filed a response to the motion to dismiss on May 6, 2002.

II. TIMELINESS

The respondents raise the issue that the instant petition may not be considered by the court because it is time-barred pursuant to 28 U.S.C. § 2244(d)(1). The court agrees that the one-year time deadline for the filing of this petition expired no later than April 23, 1997, that the petitioner's Rule 32

Rule 32 petition challenging his conviction in Lee County for the murders of Weathers and her two children.

[6] Respondents also raise issues of procedural default. Because the petition clearly is time-barred, the court need not address any other issue.

proceedings did not toll the running of the time, and that the petition cannot now be considered on the merits.

Section 2244(d), enacted April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), established for the first time a one-year deadline for the filing of *habeas* actions under § 2254 challenging the validity of state criminal convictions. The one-year limitation runs from the latest of any of four dates:

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

AEDPA further provides that the limitation period is subject to tolling under § 2244(d)(2), which states:

> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Subsection 2244(d)(2) provides for the tolling of the limitation period during those times the petitioner has pending a "properly filed" post-conviction petition in state

court. The term "properly filed application," however, is not defined by the statute, and it is the definition of this term upon which the timeliness of the instant petition depends. The State respondents argue that the instant petition was not filed within the one-year limitation period because no "properly filed" state court petition tolled the running of the limitation period.[7] In opposition to the motion to dismiss, petitioner argues that: (1) the federal *habeas* petition was timely because petitioner was required to exhaust his state court remedies before filing the federal petition, (2) the Rule 32 limitation period should not be enforced because it was not clear or well established at the time of petitioner's post-conviction proceedings; and (3) the Rule 32 limitation period was inconsistently applied at the time relevant to petitioner's post-conviction motion.

Turning to the facts of this case, the petitioner's judgment of conviction became final when the United States Supreme Court denied his petition for writ of certiorari on November 5, 1990. However, because that date was prior to the enactment of AEDPA, the petitioner would have the benefit of the one-year grace period, setting his deadline for filing a *habeas* petition in this court on April 23, 1997. *Wilcox v. Florida Department of Corrections*, 158 F.3d 1209 (11th Cir. 1998) (holding that a one-year grace period for filing a federal *habeas* petition would apply to those petitioners whose convictions became final before the date of AEDPA's enactment); *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). Consequently, absent any tolling, it is on that date the one-year limitation period would expire, causing any petition filed later than April 23, 1997, to be untimely.[8]

---

[7] It is undisputed that the instant petition was not filed within AEDPA's one-year grace period.

[8] It is important to note that petitioner does not argue that any of the other three dates from which the limitation period might begin running under § 2244(d)(1) is applicable to his case. He does not point to any new Supreme Court precedent that might be retroactively applicable to his

In accordance with subsection (d)(2), the one-year limitation period is tolled for that portion of the period during which petitioner had pending in state court a "properly filed" post-conviction petition. In this case, petitioner's Rule 32 petition was filed on August 25, 1992, before the enactment of AEDPA, and remained pending until September 15, 2000, when the Alabama Supreme Court denied *certiorari*. Accordingly, if the Rule 32 petition was "properly filed," the *habeas* petition is timely because the time from the enactment of AEDPA until September 15, 2000, was tolled by the pendency of the Rule 32 petition, and petitioner filed the instant petition within one year after that date. If the Rule 32 petition was not "properly filed," however, the respondents' motion to dismiss is due to be granted because it had no tolling effect, and the time for filing this petition expired in April of 1997, long before the filing date of September 14, 2001.

For the reasons set forth herein, the court finds that petitioner's Rule 32 petition was not "properly filed" within the meaning of Section 2244(d)(2) and that it did not toll the running of the one-year limitation period, which began to run on April 24, 1996, and expired on April 23, 1997. The instant petition filed on September 14, 2001, more than four years past the deadline, is due to be dismissed as untimely.

In the six years since the enactment of AEDPA, the issue of whether a post-conviction petition is "properly filed" often has been examined in different contexts. Several district courts have held that state post-conviction petitions that are untimely, frivolous, or subject to a procedural bar cannot be deemed to be "properly filed" for purposes of suspending the running of the AEDPA limitation period. For example, in

---

case or to the recent discovery of the factual predicate of any claim. Indeed, for any of these triggering dates to be able to save the current petition, petitioner would have to show that the triggering event occurred within one year prior to the filing of the petition on September 14, 2001. He has not done so or attempted to do so.

Valentine v. Senkowski, 966 F. Supp. 239, 241 (S.D.N.Y. 1997), the district court stated that "a post-conviction state remedy, which may be filed at any time, [may] be used to revive a right to federal relief which otherwise would be time-barred by the lapse of one year following direct appeal, thus evading the intent of the new law." To prevent the circumvention of the one-year limitations period, the court held that post-conviction petitions must be non-frivolous to be considered "properly filed" under § 2244 (d)(2). *Id.* Another judge in this court similarly held that "if a petition is found by the state courts to be barred as successive, abusive, or untimely, it would not toll the time limitation of § 2244 (d)(1)." *See, e.g., Ivory v. Mitchell*, in the District Court for the Northern District of Alabama, CV-98-AR-3003-S, October 26, 1999 (emphasis added).

The Eleventh Circuit Court of Appeals also has concluded that several types of procedural defaults may preclude a state post-conviction petition from being "properly filed" for federal limitation purposes. In particular, in early 2000, the Eleventh Circuit specifically held in *Webster v. Moore* that an untimely state post-conviction petition is not "properly filed" and thus does not toll AEDPA's statute of limitation. 199 F.3d 1256, 1258 (2000).

Several months later, the United States Supreme Court addressed a similar but distinct issue in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). In *Artuz*, the Court affirmed the Second Circuit Court of Appeals and determined that a state post-conviction petition that contained claims that were procedurally barred was nonetheless "properly filed." In reaching its conclusion the Court noted:

> An application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, **the time limits upon its delivery**, the court and office in which it must be lodged, and the requisite filing fee.

Artuz, 121 S. Ct. at 363-64 (emphasis added). The Supreme Court's conclusion is consistent with the Eleventh Circuit Court of Appeals' decision in *Webster* because the court noted that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz*, 121 S. Ct. at 364. "Claims" within a state post-conviction petition may be defaulted while others are not, but the timeliness of the filing of the application affects the entire petition, not the separate, individual claims within it. Thus, while a petition containing procedurally defaulted claims, nonetheless, may be a "properly filed application," an untimely filed petition is not a "properly filed application."[9]

Post-*Artuz*, other circuit courts of appeal have recognized that an untimely post-conviction proceeding is not "properly filed" for purposes of tolling the statute of limitations. *See, e.g.*, *Raslin v. Randle*, 2001 WL 523530 (6th Cir. May 8, 2001) (holding, in an unpublished opinion, that "untimely state collateral attacks are not properly filed and do not toll the statute of limitations"); *Outlaw v. Sternes*, 233 F.3d 453, 456 (7th Cir. 2000) (citing footnote 2 of *Artuz* in concluding that untimely state post-conviction petition is not "properly filed"). *But see Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001) (holding that if a state's rule governing timely commencement of a post-conviction petition contains exceptions that require the state court to examine the merits of a petition before dismissing it as untimely, an untimely petition may be "properly filed" for purposes of tolling AEDPA's statute of limitation).

Pre-*Artuz* opinions also have concluded that untimely filed state petitions do not toll the limitation. *Villeqas v.*

---

[9] The court notes, although recognizing that there is no precedential value in the fact, that the United States Supreme Court denied *certiorari* in *Webster* just six days after deciding *Artuz*. 531 U.S. 991, 121 S. Ct. 481, 148 L. Ed. 2d 454 (2000).

Johnson, 184 F.3d 467, 469-79 and n.2 (5th Cir. 1999) (pre-*Artuz* opinion holding that a successive state court post-conviction petition is not properly filed, but explaining that a properly filed application for purposes of § 2254 (d)(2) "is one that conforms with a state's applicable procedural filing requirements," which may include the time and place of filing); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (pre-*Artuz* determination that petition must meet rules governing time and place of filing in order to be deemed properly filed).

A few months after *Artuz* was decided, the Eleventh Circuit Court of Appeals again examined the issue of an untimely filed Florida state court post-conviction motion. In *Delancy v. Florida Department of Corrections*, 246 F.3d 1328, 1331-32 (2001), the circuit court of appeals held that the district court's dismissal of a federal *habeas* petition as time-barred was due to be reversed. The reasoning of the opinion is somewhat like the Ninth Circuit's in *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9fh Cir. 2001). In *Delancy*, the petitioner had filed a second post-conviction motion under Florida Rule of Criminal Procedure 3.850, which he asserted acted to toll the § 2244 (d)(1) statute of limitation. The district court ruled that the second motion did not toll the deadline because the second motion was filed more than two years after his conviction became final, and thus was time-barred by Florida Rule of Criminal Procedure 3.850(b). *Id.* The Eleventh Circuit reversed, finding that the motion alleged newly discovered evidence, which, under Florida's rule, provided an exception to the two-year limitations period. *Id.* at 1331-32. Thus, as in *Dictado*, whether a state post-conviction petition is timely depends upon state law, and if state law provides an exception to the usual limitation period applicable to the petition, it may not be untimely under state law and may be "properly filed" for federal *habeas* limitation purposes.

In *Hurley v. Moore*, 233 F.3d 1295 (11th Cir. 2001), the Eleventh Circuit Court of Appeals again reviewed the district

court's treatment of a time-barred petition for writ of *habeas* corpus. In *Hurley*, the petitioner filed his first state post-conviction motion within the state-law time frame, but failed to include a written oath as required by the state law. The state court denied the petition without prejudice, permitting petitioner to refile a timely, properly sworn motion. Instead of refiling a properly sworn motion, the petitioner moved for rehearing, which was denied. He then appealed the denial, which was affirmed. *Id.* at 1298. By the time Hurley later filed a second, properly sworn post-conviction motion, it was denied as untimely. *Id.* In his federal *habeas* action, the district court dismissed the petition as time-barred. On appeal, petitioner argued that his § 2254 motion was timely because his first state post-conviction motion was properly sworn. The Eleventh Circuit Court of Appeals held that his § 2254 motion could be considered timely only if the first post-conviction motion could be deemed "properly filed." The court further held that the motion, which did not contain the oath required by Florida law, was not properly filed and did not toll the running of the one-year limitation. *Id.*

A fair reading of the cases cited above is that the Eleventh Circuit Court of Appeals has determined that, consistent with *Artuz*, successive state court post-conviction petitions are "properly filed" and toll the statute of limitation, but that untimely or unsworn petitions are not "properly filed" and do not toll the limitation, unless the state court declines to apply the time-bar in favor of considering the merits, or unless the state court is required to delve into the merits of the claims in order to resolve the issue of whether the state-law time-bar applies. In the *habeas* petition filed by this same petitioner in relation to his other death-penalty case, *Siebert v. Haley*, 193 F. Supp. 2d 1260 (2002), this conclusion compelled the District Court for the Middle District of Alabama to hold that a post-conviction motion must meet state filing deadlines to be "properly filed." *Id.* at 1264.

Any questions as to whether a post-conviction motion must be timely filed in order to toll AEDPA's one-year period were definitively decided by the Eleventh Circuit Court of Appeals in *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). In *Drew*, the petitioner sought *habeas* relief following the dismissal in the state courts of his third post-conviction motion. The federal *habeas* action was clearly untimely unless the third post-conviction motion triggered the tolling provision of Section 2244 (d)(2). The court in *Drew* noted that the third motion did not allege facts that were previously unknown and unascertainable through due diligence; nor did the petitioner allege any facts relevant to any statutory exception to Florida's filing deadline for a post-conviction motion. Accordingly, the post-conviction motion was untimely under Florida law, and therefore was not "properly filed" as required to toll AEDPA's statute of limitations. *Id.* at 1284. The court of appeals explained:

> In this case, there is no doubt that Drew filed his third Rule 3.850 motion well over two years after his conviction became final. Prior to *Artuz*, this Court held in *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000), that claims considered procedurally barred under state law for reasons such as untimeliness were not properly filed and could therefore not toll the AEDPA statute of limitations. *Webster* remains valid today. According to *Artuz*, a petition is not "properly filed" if it is not filed in compliance with "the time limits upon its delivery." 531 U.S. at 8, 121 S. Ct. at 364. In a footnote, the Supreme Court explicitly left open 'the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.* at 9 n.2, 121 S. Ct. at 364 n.2 (citing *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000)).

Id. at 1284-5. Consequently, the federal appellate court affirmed the district court's dismissal of the habeas action as untimely.

In this case, petitioner filed his post-conviction motion in the state trial court on August 25, 1992. Upon motion of the respondents, the trial court dismissed the petition as untimely pursuant to Rule 32.2(c), noting that the certificate of judgment following petitioner's direct appeal was issued by the Alabama Court of Criminal Appeals on May 22, 1990, making any Rule 32 petition filed later than May 21, 1992, untimely.[10] The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied *certiorari* on September 15, 2000. Thus, the state courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed. Although the trial court examined petitioner's Rule 32 claims on the merits in addition to finding the claims time-barred, the Alabama Court of Criminal Appeals expressly held that the trial court should not have addressed the barred claims on the merits, as such an examination is not permitted by the Alabama rule. The petition contained no allegations of newly discovered evidence that might trigger the six-month exception to the two-year rule. In his appeal from the denial of his Rule 32 petition as untimely, petitioner did not assert that he was entitled to an extended deadline in accordance with Alabama Rule of Criminal Procedure 32.2(c) because his claims were premised upon newly discovered evidence.[11] Accordingly, this court is compelled, pursuant to *Artuz* and *Drew*, to conclude that the untimely state petition was not a "properly filed application" capable of tolling the limitation period and to dismiss petitioner's *habeas* petition as time-barred under § 2244(d)(1).

---

[10] Alabama Rule of Criminal Procedure 32.2(c) in effect at the time governing petitioner's motion prescribed a limitation period requiring any Rule 32 petition to be filed "within two years after the issuance of the certificate of judgment by the Court of Criminal Appeals."

[11] The Alabama rule contains a provision similar to the Florida rule at issue in *Delancy* that provides that petitions based upon newly discovered evidence may be filed within the two-year period, or within six months of the time the new evidence is discovered, whichever is later.

III. EQUITABLE TOLLING

Petitioner does not specifically argue that his petition should not be viewed as time-barred based on the doctrine of equitable tolling, but petitioner does assert that the Alabama Court of Criminal Appeals failed to notify him when it issued the certificate of judgment, instead sending a copy to the trial court only. He further asserts that he was attempting to exhaust his state court remedies in accordance with the federal court's exhaustion requirements of 28 U.S.C. § 2254(b)(1)(A) and (c). The court views these assertions as arguments in favor of equitable tolling.

The Eleventh Circuit Court of Appeals has recognized that the limitation period under § 2244(d)(1) may be equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999). The court went on to note that equitable tolling is an "extraordinary remedy" and cautioned that it is to be "applied sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citing *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990)). Other circuits likewise have restricted the use of equitable tolling to instances that are "extraordinary," "rare," and "beyond the control" of the petitioner. *See Wyzykowski v. Department of Corrections*, 226 F. 3d 1213, 1216, n.1 (11th Cir. 2000), and cases cited therein.

Petitioner has failed to demonstrate the "extraordinary circumstances" that would compel the court to apply equitable tolling. In sum, petitioner contends that he was not affirmatively informed of the issuance of the certificate of judgment, which triggered the running of the two-year statute of limitations. Petitioner further argues that his failure to meet the one-year deadline for filing the federal *habeas* petition was a result of his compliance with federal *habeas* law requiring him to exhaust state court remedies before

filing his *habeas* petition. Neither of these arguments is worthy of merit.

Even assuming petitioner's assertions are true and that petitioner was unaware that the certificate of judgment had issued, he does not contend that he made any effort to determine the status of his case. He also does not argue that he was unrepresented by counsel or that the information available at the trial court or appellate court was unavailable to him. At the time the Supreme Court denied his petition for *certiorari* on direct appeal (November 5, 1990), petitioner could have determined the deadline for filing a Rule 32 petition simply by reading the plain language of Rule 32.2(c) and contacting the Court of Criminal Appeals to discover the date on which the certificate of judgment was entered. He apparently did neither. Equitable tolling, furthermore, is not applicable in this case because petitioner was on notice, no later than April 4, 1995, when the state amended its answer to include the statute-of-limitations defense, that the state court considered his Rule 32 petition to be untimely.[12] Petitioner had actual notice of the defect in his Rule 32 filing, and the assertion of time-bar defense should have alerted him to the fact that his filing might not be considered "properly filed" for tolling purposes under the AEDPA time limitation. A petitioner exercising the diligence required would have filed his federal *habeas* action within the one-year grace period out of caution, even if he continued to contest the timeliness issue in the state courts.

Petitioner has failed to demonstrate that he took any steps to diligently pursue his claims as required by the doctrine of equitable tolling. *See Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1314 (11th Cir. 2001).

---

[12] Moreover, there is no requirement that petitioner know his post-conviction motion is time-barred in order to activate the running of the statute of limitations, only that the petition actually be time-barred. *See, e.g., Siebert v. Haley*, 193 F. Supp. 2d 1260, 1265 (M.D. Ala. 2002), and *Hoggro v. Boone*, 150 F.3d 1223 (10th Cir. 1998), cited therein.

Because petitioner failed to make any showing of the requisite diligence, he is not entitled to equitable tolling based on the assertion that he did not receive a copy of the certificate of judgment.

Petitioner's argument that the statute of limitation should be tolled because he was attempting to exhaust his state court remedies likewise is without merit. Petitioner was free to file a federal *habeas* petition even while pursuing his state court proceedings. He could have avoided the problem he now faces by filing his federal *habeas* petition in a timely manner during the one-year grace period, and then moving that the petition be stayed during the pendency of the Rule 32 petition.

Petitioner has failed to show that any "extraordinary circumstances" that were "beyond his control" prevented him from timely filing the instant petition. Accordingly, the statute of limitation is not due to be equitably tolled, and the instant petition is due to be dismissed as untimely.

IV. DEFERENCE

Petitioner presented his arguments relating to the timeliness of his Rule 32 petition in his appeal from the denial of the petition by the trial court, and the Alabama Court of Criminal Appeals addressed the issue on the merits. A federal court generally is required to defer to a state court's application of its own filing deadlines. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000).

Petitioner argues that the state court's ruling that the Rule 32 petition was untimely is not due deference by this court because the filing deadline: (1) was neither clear nor well established at the time he filed his Rule 32 petition, and (3) was not consistently applied. Neither of these contentions warrants disregarding the state court finding of untimeliness of the Rule 32 petition.

A. Clear and Well Established

Petitioner first contends that the time limitation of Rule 32.2(c) was unclear and not well established. Prior to August 1, 2002,[13] Rule 32.2(c) stated:

> Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on grounds specified in Rule 32.1 (a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala. R. App. P.; or (2) In the case of a conviction not appealed to the Court of Criminal Appeals, within two (2) years after the time for filing an appeal lapses. The court shall not entertain a petition based on the grounds specified in Rule 32.1 (e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the two-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.

Ala. R. Crim. Pro. 32.2(c). The rule clearly dictates that the post-conviction petition must be filed within two years after the certificate of judgment is issued by the Court of Criminal Appeals. Rule 32.2(c) is in no way unclear, and petitioner does not assert that the language of the rule is unclear. Petitioner argues that his conviction did not become "final" until the United States Supreme Court denied *certiorari* on

---

[13] On August 1, 2002, Rule 32.2(c) was modified to shorten the time for filing a petition to one year. Otherwise, the text of the rule remains unchanged from what it has been since it was first adopted as Temporary Rule 20.2(c) in 1987.

November 5, 1990. Thus, petitioner asserts, there was no "final" disposition of his case, and the certificate of judgment should not have been issued, pursuant to Alabama Rule of Appellate Procedure 41(b). Alabama Rule of Appellate Procedure 41, provides:

> **(b) Stay of Certificate of Judgment Pending Petitions for Certiorari to Courts of Appeals.** The timely filing of a petition for certiorari in the Supreme Court shall stay the issuance of the certificate of judgment by the courts of appeals, which stay shall continue until the final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for certiorari, the certificate of judgment of the courts of appeals shall issue immediately. If the time for the issuance of the certificate of judgment shall have been shortened pursuant to subdivision (a) hereof, the court of appeals shall grant such relief, upon motion, as may be appropriate.

Ala. R. App. P. 41(b). Petitioner argues that the certificate of judgment rendered in his case should not govern the timeliness issue because he had applied for *certiorari* with the United States Supreme Court, which had not yet been denied. Thus, petitioner asserts there had been no "final disposition" of his case as required in Rule 41(b).

Petitioner presented this same argument to the Alabama Court of Criminal Appeals, which determined that it was clear that "Siebert's conviction became final on the date the Alabama Court of Criminal Appeals issued the certificate of judgment ...." *Siebert v. State*, 778 So. 2d 842 (Ala. Crim. App. 1999). Petitioner does not dispute that the "final disposition" required by Rule 41(b) clearly references the disposition of the case by the Alabama Supreme Court, not

the United States Supreme Court.[14] Not only does the language of the Rule so indicate, but the practice of the Alabama Court of Criminal Appeals has been to issue the certificate of judgment upon completion of the review in the Alabama Supreme Court, regardless of whether an appeal is then made to the United States Supreme Court. Accordingly, this argument is without merit.

Petitioner next argues that the two-year limitation for the filing of Rule 32 petitions was not "well established" at the time petitioner filed his Rule 32 petition. The two-year limitation period for filing a petition for post-conviction relief in Alabama took effect less than two weeks after petitioner was convicted, and about two weeks before petitioner was sentenced. *See* Ala. R. Crim. P. Temporary Rule 20.2(c), enacted April 1, 1987.[15] *See also Eddins v.*

---

[14] The Alabama Supreme Court addressed this issue recently in *Ex parte Hutcherson*, 2002 WL 960044, __ So. 2d __ (Ala., May 10, 2002). In *Hutcherson*, the petitioner, a death penalty inmate, had filed an out-of-time Rule 32 petition based on his attorney's belief that the two-year period began to run after review by the United States Supreme Court, rather than upon issuance of the certificate of judgment by the Alabama Court of Criminal Appeals. *Id.* The issue before the court was whether a writ of *mandamus* issued by the Alabama Court of Criminal Appeals directing the trial court to grant the motion to dismiss the Rule 32 petition as untimely was appropriate for *mandamus* relief. In a dissenting opinion, however, Justice Stuart noted that Rule 32 "specifically provide[s] that the time runs from the issuance of a certificate of judgment by the Court of Criminal Appeals." *Id.* at *6.

[15] The rule states:

> (c) STATUTE OF LIMITATIONS. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 20.1(a) and (f), unless the petition is filed (1) In the case of a conviction appealed to the court of criminal appeals, within two years after the issuance of the certificate of judgment by the court of criminal appeals under Rule 41, Alabama Rules of Appellate Procedure .... Provided, however, that the two-year period during which a petition may be brought shall in no case be deemed to have begun to run

State, 555 So. 2d 323 (Ala. Crim App. 1989). By the time petitioner's conviction became "final" by the conclusion of his direct appeal in November of 1990, the rule had been in effect for more than three years.

Petitioner's argument is premised on *Daniels v. State*, 650 So. 2d 544 (Ala. Crim. App. 1994). Petitioner argues that in *Daniels*, the court did not question the timeliness of the Rule 32 petition because it was filed within two years after the United States Supreme Court denied *certiorari*. Petitioner's argument misstates both the history of the case and the proposition for which the case stands.

In *Daniels*, the defendant was convicted of capital murder and was sentenced to death in 1978. He appealed to the Alabama Court of Criminal Appeals, which in 1980 reversed and remanded for new trial. The United States Supreme Court in 1982 vacated the Alabama Court of Criminal Appeals' decision and remanded for further consideration in light of *Hopper v. Evans*, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982). Following remand, the Alabama Court of Criminal Appeals determined that the defendant was not entitled to a new trial and affirmed the conviction in 1985, but vacated the death sentence and remanded for re-sentencing. *See Daniels*, 534 So. 2d at 658. Defendant was resentenced, and he appealed the new sentence, which was affirmed by the Alabama Court of Criminal Appeals on October 13, 1987. *Id.* The Alabama Supreme Court affirmed the conviction on September 30, 1988, in *Daniels v. State*, 534 So. 2d 664 (Ala. 1988), and the United States Supreme Court denied *certiorari* review by order dated January 23, 1989. *Daniels v. Alabama*, 488 U.S. 1051, 109 S. Ct. 884, 102 L. Ed. 2d 1007. The defendant filed his Rule 32 petition on March 20, 1990.

---

before the effective date of this Temporary Rule 20 (April 1, 1987).

Ala. R. Crim. P. 20.2(c) (1987).

The petitioner has not provided any evidence as to when the Alabama Court of Criminal Appeals issued its certificate of judgment in *Daniels*, but the applicable provisions of Rule 41 would require that the certificate of judgment be issued after the Alabama Supreme Court denied certiorari on September 30, 1988. The defendant in *Daniels* filed the Rule 32 petition at issue in the case cited by petitioner on March 20, 1990, approximately 18 months after the certificate of judgment was due to be issued, and well within the two-year statute of limitations. Accordingly, *Daniels* cannot be read to stand for the proposition that the limitations period prescribed by Rule 32.2(c) or its predecessor, Temporary Rule 20.2(c), is not "well established." To the contrary, Alabama case law is replete with examples through the years since the rule was enacted in which the Alabama courts have strictly enforced the two-year limitation for filing petitions for post-conviction relief. *See, e.g., Dowdell v. State*, 2002 WL 1398002 (Ala. Crim. App. June 28, 2002); *Kaska v. State*, 709 So. 2d 500 (Ala. Crim. App. 1997); *Rahman v. State*, 563 So. 2d 50 (Ala. Crim. App. 1990); *Cochran v. State*, 548 So. 2d 1062 (Ala. Ct. App. 1989). The petitioner has not demonstrated that there have been any cases in which the respondents raised the issue of time-bar and the court chose not to apply the limitations period.[16] Finally, petitioner further asserts that the application of the time-bar "would make no sense" because judicial economy and efficiency weigh against a requirement that petitioner litigate both his direct appeal in the United States Supreme Court and his Rule 32 petition in the state court at the same time. While this argument may fairly be addressed to those who enacted

---

[16] The court agrees that there have been instances in which the state failed to raise the time limitation as a defense and the courts chose not to address the time bar issue or found that the time-bar had been waived, but such instances do not compel a conclusion that the clear mandate of Rule 32 was not well established. Furthermore, there are instances early in the history of the two-year time-bar in which courts recognized that Rule 20's limitation must be strictly applied. *See, e.g., Eddins v. State*, 555 So. 2d 323 (Ala. Crim. App. 1989).

the time limitation, the court is bound to do not what the parties argue is "sensible," but what the prevailing law expressly requires.[17] Accordingly, petitioner's argument that the two-year limitation was not "well established" is without merit.[18]

B. Consistently Applied

Petitioner argues that the two-year bar has not been consistently applied, and he points the court to two cases in which the Rule 32 petitions were filed more than two years after the certificate of judgment was issued, but less than two years after the United States Supreme Court denied *certiorari*. *Callahan v. State*, 767 So. 2d 380 (Ala. Crim. App. 1999); *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999). An examination of those cases does indicate that the Rule 32 petitions at issue were time-barred; however, there is no indication in any of the evidence presented to this court or in the opinions that the state ever raised the issue of the time-bar, or that the court ever considered the timeliness of the petitions.

This same argument was presented by Siebert in his *habeas* petition filed with the Middle District of Alabama in connection with his capital murder convictions arising from the slaying of the Weathers family. That court noted: "[T]he court is not aware of any cases in which Alabama courts declined to enforce the statute of limitations where the defense was expressly raised as to claims to which the statute of limitations applied." This court agrees. The fact that in

---

[17] One of the cases cited by petitioner points out that, under Rule 32, a petitioner can file a post-conviction petition even while the appeal of his conviction is pending, because Rule 32.6 provides that "[a] petition may be filed *at any time* after entry of judgment and sentence." *Barnes v. State*, 621 So. 2d 329 (Ala. Crim. App. 1992).

[18] Although petitioner does not raise the argument that the time-bar should not apply because he is subject to the death penalty, it should be noted the Alabama courts have definitively stated that the procedural bars of Rule 32 apply with equal force in capital cases. *See, e.g., State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

two instances the state failed or declined to raise the issue of the time-bar and the court failed or declined to *sua sponte* examine the timeliness issue does not constitute the kind of "inconsistency" that would overcome the requirement that a federal court give deference to the state rule. *Dugger v. Adams*, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 575 (1988) (recognizing that a rule is consistently applied where a vast majority of the cases apply the procedural bar); *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). In this case, the petitioner has pointed to only two cases in which the time-bar was not applied, and in those cases the state did not assert and the court did not examine the issue of timeliness. On the other hand, the court is aware of many cases in which the time-bar was applied. Accordingly, the court concludes that petitioner's argument that the time-bar was not "consistently applied" is without merit.

CONCLUSION

Accordingly, for the reasons stated above, the court finds that the petition for writ of *habeas corpus* under 28 U.S.C. § 2254 is due to be dismissed with prejudice as time-barred by 28 U.S.C. § 2244(d). Petitioner, with the assistance of counsel, waited until September 2001 to file the instant *habeas* petition, well more than five years after the limitation period was enacted in 1996. The Rule 32 petition pending at the time AEDPA became law did not act to toll the running of the limitation period under § 2244(d)(2), because it was found to be itself untimely under Alabama state law and procedure, a finding this court must respect. Being untimely itself, the Rule 32 petition was not a "properly filed application" within the meaning of § 2244 (d)(2), such that it could toll the running of the federal limitation period. *See Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). Further, no "extraordinary circumstances" exist that justify the equitable tolling of the limitation.

By separate order, the court will GRANT the respondents' motion to dismiss the instant petition with prejudice.

DATED this 30 day of September, 2002

/s/ Inge P. Johnson
INGE P. JOHNSON
UNITED STATES DISTRICT JUDGE

Siebert v. Campbell
C.A.11 (Ala.), 2003.

United States Court of Appeals, Eleventh Circuit.
Daniel SIEBERT, Petitioner-Appellant,
v.
Donal CAMPBELL, Commissioner, Alabama Department of Corrections, Charlie E. Jones, Warden, William H. Pryor, Jr., The Attorney General of the State of Alabama, Respondents-Appellees.

Daniel Siebert, Petitioner-Appellant,
v.
Donal Campbell, Commissioner, Alabama Department of Corrections, Respondent-Appellee.
Nos. 02-13685, 02-15890.

June 23, 2003.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Daniel Siebert appeals from the dismissal of his petitions for habeas corpus under 28 U.S.C. § 2254. Although his case reaches us some eleven years after he first sought collateral review of his convictions and sentences of death, the courts have to date determined only that he is subject to procedural bars and therefore have never allowed the merits of his claims to control.[1] The district courts dismissed Siebert's petitions on the ground that they were untimely

[1] Alabama's courts commented on the merits of Siebert's claims, but only as an alternative ground of decisions that also held his petitions untimely. *See Siebert v. State,* 778 So. 2d 842, 846 (Ala. Crim. App. 1999) (describing ruling of Lee County Circuit Court as "disposing of the claims in the petitions as procedurally barred, but nonetheless also disposing of these claims on their merits"); *id.* (commenting that "Siebert received a fair trial"). It cannot be said that the courts allowed the merits to control in taking this approach.

under the one year statute of limitations established by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), now codified at 28 U.S.C. § 2244(d)(1). Siebert had argued that the one-year deadline did not bar his petitions because a separate AEDPA provision, 28 U.S.C. § 2244(d)(2), tolled the limitations period for the time during which his "properly filed" applications for post-conviction relief were pending in the Alabama courts.

Because state courts had held in these proceedings that Siebert had missed the expiration of Alabama's own post-conviction statute of limitations, the district courts concluded that Siebert's state petitions were not "properly filed" and that AEDPA's tolling provision thus did not apply. The question before us is therefore whether Siebert's Alabama petitions, which were accepted by the courts but ultimately found to have been filed late, should be considered "properly filed" within the meaning of AEDPA's tolling provision and the Supreme Court's interpretation of that term in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000).

BACKGROUND

Siebert was tried in two separate prosecutions, one in Talladega County (for the murder of Linda Jarman) and one in Lee County (for the murder of Sherri Weathers and her two minor sons). He was found guilty of all charges, and at the end of each of his trials he was sentenced to death, twice. Siebert appealed his two convictions and sentences to the Alabama Court of Criminal Appeals, which issued separate decisions addressing different challenges Siebert had raised in each case. The Alabama Supreme Court subsequently denied relief, publishing its own analysis of many of Siebert's claims in the Lee County case, *Ex parte Siebert*, 555 So. 2d 780 (Ala. 1989), as well as a summary statement in the Talladega County case announcing that it had found "no error or defect in the proceedings that adversely affected the rights of the defendant." *Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990). Siebert petitioned the United States

Supreme Court for *certiorari* but was denied review separately in each case in 1990.

In 1992 Siebert filed the two petitions that are relevant here, challenging his Lee County and Talladega County convictions and sentences separately in each county's circuit court under Rule 32 of the Alabama Rules of Criminal Procedure. The state responded with separate answers in the months following each of Siebert's petitions, conceding that Siebert was entitled to an evidentiary hearing on his claim that counsel had provided ineffective assistance. The petitions were consolidated for an evidentiary hearing in the Lee County Circuit Court. After Siebert filed amendments to both petitions on March 29, 1995, the trial court commenced hearing evidence on April 3, 1995.

The next day, the state asserted for the first time that Siebert's applications were barred because he had failed to meet the two-year statute of limitations then generally applicable to most post-conviction claims in Alabama.[2] After continuing to take evidence on April 4 and 5, as well as on September 26, 1995 and January 21, 1997, the circuit court adopted the state's proposed, 87-page memorandum opinion as its final judgment, denying Siebert relief on a variety of substantive and procedural grounds. Among the many findings of the circuit court was its determination that relief was precluded by Rule 32's statute of limitations.

The Court of Criminal Appeals affirmed, finding no merit in Siebert's argument that the two-year statute of limitations set forth in Ala. R. Crim. P. 32.2(c) must be raised as an affirmative defense in the state's first responsive pleading. *Siebert v. State,* 778 So. 2d 842, 847-48 (1999). The court distinguished two earlier Alabama cases holding the state to have waived the limitations defense, reading them as addressing only the circumstance in which the state raises the

---

[2] The statute of limitations – which is actually codified not by statute but by an Alabama Supreme Court rule – was later shortened to one year by an order effective August 1, 2002.

defense for the first time on appeal. *Id.* Noting that Siebert had been allowed to amend his petitions on March 29, 1995, five days before the evidentiary hearing, the court reasoned that the state was properly allowed to do the same within a reasonable time. *Id.* at 848 (adopting portion of circuit court's opinion).

On September 14, 2001, Siebert filed two different federal habeas petitions, one in the Middle and one in the Northern District of Alabama. Both district courts held his petitions untimely under AEDPA because they were not filed within a year of that statute's effective date. The district court decisions, although accepting the premise that a state time bar must be firmly established and regularly followed to render a late petition improperly filed, nonetheless rejected Siebert's claim that the Alabama statute of limitations failed to meet this standard. The district court decisions also declined to apply the doctrine of equitable tolling on Siebert's behalf. Both district courts thereafter granted Siebert certificates of appealability.[3]

DISCUSSION

Under 28 U.S.C. § 2244(d)(1), persons in custody pursuant to a judgment of a state court may file petitions for habeas corpus within one year of any of four dates specified by the statute.[4] Because Siebert's convictions became final

---

[3] The certificate of appealability granted by the Middle District of Alabama followed its denial of Siebert's motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment denying habeas relief, as well as a subsequent grant of Siebert's motion to reopen the time for taking an appeal. The state argues on appeal that only the denial of Siebert's Rule 59 motion, not the underlying dismissal of his habeas petition, is before this Court. We reject this argument in light of the procedural history recounted by the district court in its order reopening the time for taking an appeal, as well as its grant of a certificate of appealability as to both its Rule 59 order and the underlying habeas dismissal.

[4] In addition, equitable tolling of the limitations period is in some instances appropriate under circumstances not encompassed by the statutory exceptions to the time bar. *See Drew v. Department of Corrs.,*

prior to the effective date of AEDPA, he had until April 23, 1997 to file a federal habeas petition. *Wilcox v. Florida Dept. of Corrs.*, 158 F.3d 1209, 1210 (11th Cir. 1998). Siebert did not file until September 14, 2001. He argues, however, that the one-year statute of limitations does not bar his petitions because AEDPA also provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). Siebert's entitlement to have the limitations period tolled thus depends on whether his applications for state post-conviction review under Ala. R. Crim. P. 32 were "properly filed." If they were, his federal habeas petitions are not untimely because the federal limitations period would have been tolled from April 24, 1996 until September 15, 2000, the date on which the Alabama Supreme Court denied review. Since Siebert filed on September 14, 2001, he will have met the one-year deadline.

I. "Properly Filed" Inquiry Under AEDPA's Tolling Provision

The first round of jurisprudence construing the meaning of "properly filed" produced a circuit split. A majority of circuits determined that an application for post-conviction relief could be "properly filed" even if claims asserted therein were procedurally barred or otherwise meritless. *Habteselassie v. Novak*, 209 F.3d 1208, 1211 (10th Cir. 2000) ("affirmative defenses that preclude a court from granting relief on the merits, as opposed to pure filing requirements, require analysis in some manner of the substance of the claims set forth by the petitioner and do not

---

297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237, 123 S. Ct. 1364, 155 L.Ed.2d 205 (2003).

prevent a motion from being 'properly filed' for purposes of § 2244(d)(2)"); *Bennett v. Artuz,* 199 F.3d 116, 122 (2d Cir. 1999) (declining "to engraft a merit requirement into § 2244(d)(2) without some indication of congressional intent to do so") (internal quotation marks and citation omitted), *aff'd,* 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000); *Villegas v. Johnson,* 184 F.3d 467, 469 (5th Cir. 1999) (criticizing authorities that "have offered little analysis to support their conclusion that the phrase 'properly filed' connotes some measure of merit"); *Lovasz v. Vaughn,* 134 F.3d 146, 149 (3d Cir. 1998) (rejecting "the notion that a meritless PCRA petition cannot constitute 'a properly filed application' under § 2244(d)(2)").

Two other circuits, however, held that applications containing claims barred under state procedural rules are not "properly filed," regardless of whether a procedural bar constituted a filing requirement *per se.* *Dictado v. Ducharme,* 189 F.3d 889, 892 (9th Cir. 1999) (defining "'properly filed application' to mean an application submitted in compliance with the procedural laws of the state in which the application was filed"); *Tinker v. Hanks,* 172 F.3d 990, 991 (7th Cir. 1999) (holding that state "screening mechanisms ... determine when an application for postconviction relief is proper (as in 'properly filed')"). This circuit aligned itself with the view of the Seventh and Ninth Circuits. *See Weekley v. Moore,* 204 F.3d 1083, 1086 (11th Cir. 2000) (holding that failure to comply with "procedural requirement forbidding successive motions" rendered petition improperly filed because "we are persuaded by the reasoning" of *Dictado* and *Tinker*); *but see id.* at 1086 (Barkett, J., dissenting) (criticizing majority's interpretation as "in direct conflict with the plain meaning of the phrase 'properly filed'" as used in AEDPA's tolling provision).

In *Artuz v. Bennett,* 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000), the Supreme Court unanimously rejected the broader approach followed by the Seventh and

Ninth Circuits and in our own *Weekley* decision. Instead, the Court held that an application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing *filings*." *Id.* at 8, 121 S. Ct. 361 (emphasis supplied). Contrasting a "condition to filing" with a "condition to obtaining relief," the Court concluded that non-compliance with conditions to obtaining relief does not prevent a habeas petitioner's state application from being "properly filed." *Id.* at 11, 121 S. Ct. 361. On this ground it ruled against the state, which had argued that a post-conviction application was improperly filed because it failed to comply with two New York procedural bars, one precluding claims that were determined on the merits on appeal and the other precluding claims not raised on appeal due to "unjustifiable failure."

The Court approvingly cited decisions from the courts of appeals distinguishing between the "properly filed" inquiry and a state court's determination that claims were procedurally barred. *Id.* at 8, 121 S. Ct. 361 (citing *Habteselassie*, 209 F.3d at 1210-11, and *Villegas*, 184 F.3d at 469-70). It also independently reversed those courts, including this one, that had interpreted the "properly filed" provision to require compliance with procedural bars generally. *See Weekly v. Moore*, 531 U.S. 1063, 121 S. Ct. 751, 148 L.Ed.2d 654 (2001);[5] *Tinker v. Hanks*, 531 U.S. 987, 121 S. Ct. 476, 148 L.Ed.2d 450 (2000).[6] On remand of our *Weekley* decision, we read *Artuz* to dictate a result opposite the one we had previously reached. *Weekley v.*

---

[5] The United States Reports misspell petitioner Jeffrey Weekley's name in captioning the Supreme Court order vacating our opinion.

[6] In the third court of appeals case requiring petitioners' applications to be free of procedural bar, the Ninth Circuit had held its mandate pending the Supreme Court's decision in *Artuz*. *See Dictado v. Ducharme*, 244 F.3d 724, 725 (9th Cir. 2001). After the Supreme Court handed down its decision, the Ninth Circuit withdrew its earlier opinion and published a new opinion finding the petitioner's state application properly filed. *Id.* at 725, 728.

Moore, 244 F.3d 874 (11th Cir. 2001) ("*Weekley II*"). Thus, we ultimately held that a Florida prisoner's post-conviction motions were "properly filed" even though the Florida courts had dismissed them as successive. Other courts have likewise recognized *Artuz* to define the term "properly filed" in a manner that calls for an inquiry distinct from state courts' own application of state rules governing post-conviction petitions. *See, e.g., Pratt v. Greiner*, 306 F.3d 1190, 1192, 1195 (2d Cir. 2002) (holding that "even if Pratt's state court motion relied on a forged document, it still was 'properly filed' under AEDPA," since federal "courts, on habeas review, should not scrutinize the legitimacy of state court filings to determine whether they were 'properly filed' within the meaning of § 2244(d)(2)").

Neither the Supreme Court's *Artuz* decision nor our own *Weekley* decisions directly addressed non-compliance with a state post-conviction statute of limitations. Prior to *Artuz*, however, we had held that an application must meet state filing deadlines in order to toll the AEDPA statute of limitations. *Webster v. Moore*, 199 F.3d 1256, 1258 (11th Cir.), *cert. denied*, 531 U.S. 991, 121 S. Ct. 481, 148 L.Ed.2d 454 (2000).[7] Nonetheless, we recognized out-of-circuit authority holding that the tolling provision does not require compliance with "more complex state procedural doctrines relating to timeliness or repetitiveness." *Id.*

Our inquiry in *Webster* lacked the guidance provided by the Supreme Court's discussion in *Artuz* of the meaning of "laws and rules governing filings." The Court gave some content to this phrase by discussing several qualifying examples and then setting forth a broad distinction:

---

[7] In *Webster*, we presumed the limitations period established by Fla. R. Crim. P. 3.850 to be mandatory unless a prisoner met one of several narrow and specifically described exceptions enumerated by the rule. For reasons discussed *infra*, we believe the limitations period established by Ala. R. Crim. P. 32.2 was not mandatory in this sense when it was applied in Siebert's case.

> [Such rules] usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. In some jurisdictions, the filing requirements also include, for example, preconditions imposed on particular abusive filers, or on all filers generally, cf. 28 U.S.C. § 2253(c) (1994 ed., Supp. IV) (conditioning the taking of an appeal on the issuance of a "certificate of appealability"). But in common usage, the question whether an application is "properly filed" is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar.

Id. at 8-9, 121 S. Ct. 361 (emphasis in original; additional citations omitted). *See also Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 2143, 153 L.Ed.2d 260 (2002) (Kennedy, J., dissenting) (explaining that "*Artuz* ... recognized that an 'application' is a 'document' distinct from the legal claims contained within it").

In a footnote, the Court added that it would "express no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.* at 9 n. 2, 121 S. Ct. 361 (citation omitted). It did, however, cite a Fifth Circuit case holding a Louisiana prisoner's application for state post-conviction relief "properly filed" because two statutory exceptions to the state's filing deadline required a limited inquiry into particular claims. *See Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000), *cited in Artuz*, 531 U.S. at 9 n. 2, 121 S. Ct. 361. On the Fifth Circuit's view, the inquiry required to apply the exceptions meant that timeliness was more properly regarded under the Louisiana statute as a limitation on "the state court's ability to grant relief" than as "an absolute bar to filing." *Id.* As already noted, *Artuz* itself reiterated this distinction between conditions to filing and conditions to obtaining relief, though it did so in a portion of its opinion not discussing the Fifth Circuit's *Smith* decision

or timely filing requirements.

We note that the context in which *Artuz* refers to "time limits upon [a petition's] delivery" – alongside references to the form of a document, the proper court and office for filing, and fees – addresses a narrow category of rules setting forth prerequisites to the commencement of suit. Compliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular claim (or all claims). By tying the term "time limits" to "delivery," *Artuz* might be read to refer to deadlines governing *service* upon an opposing party, which, unlike timeliness, is ordinarily a prerequisite to the formal commencement of suit. The Court's discussion of time limits on "delivery" might also suggest a concern with requirements that papers be submitted within the hours of business maintained by a clerk's office.

The *Artuz* Court did not further amplify the meaning of its references to "time limits upon ... delivery" and "timely filing requirement[s]." Nor need we presently decide whether the Supreme Court's language refers only to rules addressing the mechanics of delivery, such as deadlines for service or hours for lodging papers. Because issues "pertaining to the timeliness of a prisoner's application for state post-conviction relief are not homogenous," *Habteselassie,* 209 F.3d at 1211 n. 3 (citations omitted), we believe this case is best resolved narrowly, by attending to the precise nature of the Alabama time bar applied in Siebert's post-conviction proceedings. Under Ala. R. Crim. P. 32.2(c), state courts retained discretion to address claims raised in late petitions. In the sections that follow, we first discuss the Alabama authorities that lead us to characterize the time bar, as applied in Siebert's case, in this manner. We then proceed to consider whether a discretionary statute of limitations is a "timely filing requirement" such that noncompliance prevents a state post-conviction application from being "properly filed" within the meaning of §

2244(d)(2).

II. Discretionary Application of Alabama's Post-Conviction Time Bar

The state argues that the Rule 32 statute of limitations is a jurisdictional bar that may be noticed at any stage of proceedings and always requires dismissal. This contention appears to be an accurate statement of Alabama law as it now stands. Under *Williams v. State,* 783 So. 2d 135, 137 (Ala. Crim. App. 2000), "the failure to file a Rule 32 petition within the two-year limitations period is a jurisdictional defect that can be noticed at any time and is not waived by the failure of the state to assert it."

For the purpose of applying AEDPA's tolling provision, however, our point of reference is not Alabama law as it now exists. Under the judicially developed doctrine of procedural default, *see Coleman v. Thompson,* 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977), only rules that are "firmly established and regularly followed" qualify as adequate state grounds for precluding substantive review of federal claims. *Edwards v. Carpenter* 529 U.S. 446, 450, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000); *Ford v. Georgia,* 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L.Ed.2d 935 (1991). We have not previously stated that this standard likewise applies to state procedural rules in the "properly filed" inquiry under § 2244(d)(2), but we have implied that it does. *See Webster,* 199 F.3d at 1259 & n. 4 (pausing to note, in concluding that state court ruling warranted deference in "properly filed" inquiry, that "[t]here is no contention in this case that the state court's rule is not 'firmly established and regularly followed'") (citation omitted). The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice. Accordingly, we

conclude that a rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision. For several reasons, we believe the jurisdictional character of Rule 32's time bar did not meet this standard at the time of Siebert's post-conviction proceedings.

We first note that the only case cited by the state in arguing that the Alabama statute of limitations is jurisdictional is *Williams*, which itself cited as positive authority only one decision construing the Rule 32 time bar: Siebert's own case.[8] The other precedents cited by *Williams* were four cases discussing statutes of limitation in the context of the state's prosecution of an accused. *Williams*, 783 So. 2d at 137. In our view there exists rather little analogy between statutes of limitation restricting the state's authority to initiate prosecutions and a statute of limitations restricting convicted defendants' opportunity to bring post-conviction challenges. Hence we believe that apart from Siebert's own case, the precedents cited in *Williams* were largely inapposite to its conclusion that the Rule 32 statute of limitations imposes a jurisdictional bar. The very necessity of relying on Siebert's case suggests that the jurisdictional character of the post-conviction limitations period was not

---

[8] Despite the reliance placed on it by *Williams*, the decision denying Siebert relief did not discuss whether the Rule 32 statute of limitations was a jurisdictional bar. Rather, Siebert himself argued that Rule 32.2(c) was *not* jurisdictional, but the appeals court refused to address this contention because he had not addressed it to the trial court. *Siebert v. State*, 778 So. 2d 842, 847 (Ala. Crim. App. 1999). The portion of *Siebert* subsequently quoted in *Williams* concerned only the conceded authority of Alabama circuit courts to decide *sua sponte* to dismiss when "a simple reading" of the petition shows that it "is obviously without merit or is precluded." *Williams*, 783 So. at 136-37 (Ala. Crim. App. 2000) (quoting *Siebert*, 778 So. 2d at 847 (internal citation omitted)). A court's discretionary authority to dismiss an untimely petition on its own initiative is distinct from a party's authority to enforce a time bar, and it is most certainly distinct from a jurisdictional rule *requiring* a court to dismiss untimely petitions whenever their untimeliness may be noticed.

"firmly established" when *Siebert* itself was decided.

Second, we note that *Williams* expressly manifests the appeals court's awareness that it was announcing a new rule. In characterizing a failure to file within the two-year limitations period as a jurisdictional defect, the court stated that "[a]ny previous holdings to the contrary are hereby expressly overruled." *Williams,* 783 So. 2d at 137. It then cited *Howard v. State,* 616 So.2d 398 (Ala. Crim. App. 1993), as an example. In *Howard,* the court had declined to apply the statute of limitations because it found the state had not met its burden of pleading the time bar. *Id.* at 399. As *Williams* itself recognized, this treatment of the statute of limitations is in conflict with the rule that Alabama courts lack jurisdiction to entertain untimely Rule 32 petitions.

Finally, our conclusion that the jurisdictional character of the time bar was not firmly established at the time of Siebert's Rule 32 proceedings draws support from the opinions denying relief on his petitions. First, neither the circuit nor the appeals court "dismissed" the petitions, as would be the proper disposition upon a determination that no jurisdiction exists, *see, e.g., Williams,* 783 So. 2d at 137; rather, both courts considered the case and ultimately denied relief. *See Siebert,* 778 So. 2d at 846 (discussing Lee County Circuit Court ruling, which "adopted the State's proposed memorandum opinion as its final judgment, denying Siebert the relief requested in his petitions"); *id.* at 856 ("affirm[ing]" denial of relief). Second, the circuit court not only held Siebert's applications untimely, but also held his claims to lack merit and to be barred under several different procedural rules. *Id.* at 846 (discussing 87-page circuit court ruling). The court of criminal appeals, although faulting the circuit court for disposing of the merits, itself pronounced that "we have evaluated the evidence presented at the evidentiary hearing on Siebert's Rule 32 petitions, and we conclude that Siebert received a fair trial and that the trial court correctly denied the petition." *Id.* Neither the circuit court's explicit merits determinations nor the court of

criminal appeals' own evidence-related aside are consistent with a determination that jurisdiction was lacking. Third, both the circuit court and the court of appeals discussed a number of non-jurisdictional bases for allowing the state to raise the time bar despite not having pled this defense in its original response to Siebert's petitions. *Id.* at 848 (discussing Rule 32 statute of limitations and quoting circuit court's opinion allowing state to raise defense in amended answer). All of this discussion would be superfluous if the courts might as easily have relied on the rule's supposedly jurisdictional character.

For these reasons, we believe that although the time bar may now be of jurisdictional import under *Williams*, this was not the case at the time of Siebert's Rule 32 proceedings.

Alabama law made clear instead that noncompliance with the Rule 32 time bar did not divest courts of discretion to entertain late petitions should they choose to do so, at least in the absence of an appropriate pleading by the state of a limitations defense. This was particularly clear with respect to courts' power to rule on the merits of a late-filing petitioner's claims as an alternative ground for denying relief. In *Jackson v. State*, 612 So. 2d 1356, 1357 (Ala. Crim. App. 1992), the court found that a Rule 32 petitioner had filed "over four months beyond the two-year statute of limitations set out in Rule 32.2(c)." The court also noted, however, that "[g]enerally the statute of limitations is an affirmative defense that must be affirmatively pleaded or it is waived," and that the state had not raised the time bar until the conclusion of testimony at an evidentiary hearing.[9] *Id.* Rather than decide whether this constituted a waiver, the court upheld the circuit court's denials of relief on the merits,

---

[9] The Court of Criminal Appeals noted that the record showed the district attorney requesting at the conclusion of the evidentiary hearing to "renew" the state's motion to dismiss the petition as time-barred. *Jackson*, 612 So. 2d at 1357. The court added, however, that it found "no indication in the record" that "the district attorney ever made an earlier motion on this basis." *Id.*

attached the circuit court's opinion as an appendix, and itself addressed the one claim neglected by the circuit court, finding it also to be "non-meritorious as a matter of law" and "due to be denied, irrespective of any procedural bar." *Id.*

The Alabama courts' former discretion to entertain late petitions also encompassed the power to grant relief. In *Howard v. State,* 616 So. 2d 398 (Ala. Crim. App. 1993), the Court of Criminal Appeals held that the state, which "merely denied the allegations of the petition" in its "Answer and Motion to Dismiss," had not satisfied its "burden of pleading any ground of preclusion." *Howard,* 616 So. 2d at 399 & n. 1 (quoting Ala. R. Crim. P. 32.3). The appeals court therefore remanded the case for further consideration of the petitioner's claims that he had not been informed of his right to appeal and that his prosecution subjected him to double jeopardy. By reversing the lower court and remanding, the court demonstrated its power to grant typical appellate remedies even when proceedings were originally commenced via an untimely petition.

In decisions prior to and contemporaneous with Siebert's proceedings, the legal analyses set forth by the Court of Criminal Appeals likewise implied the courts' power to vacate convictions or reduce sentences on the basis of claims raised in untimely petitions. In *Howard,* by remanding for further proceedings, the appeals court contemplated the possibility that the circuit court would vacate the petitioner's conviction or permit him to take an out-of-time appeal. In *Callahan v. State,* 767 So. 2d 380 (Ala. Crim. App. 1999), the court recounted a procedural history in which a death-sentenced prisoner filed a Rule 32 petition some ten and a half months after the expiration of the normal two-year limitations period. *Id.* at 383. Nonetheless, the court addressed the substance of each of the petitioner's dozens of claims as to how certain asserted failures of his trial and appellate counsel constituted constitutionally ineffective assistance. Rather than hold these claims subject to Rule 32's time bar, the court held repeatedly that the petitioner had

failed to carry "his burden of proving by a preponderance of the evidence the facts necessary to show that he is entitled to relief." *E.g., id.* at 394, 395, 396, 397, 401. The court used the same language in rejecting the petitioner's claim that the prosecution had failed to disclose exculpatory evidence. *Id.* at 402. With respect to a range of additional substantive claims, the court applied procedural bars unrelated to the statute of limitations. *Id.* at 404. Similarly, in *Jones v. State,* 753 So. 2d 1174 (Ala. Crim. App. 1999), the petitioner filed a Rule 32 petition roughly two months after the end of the normal two-year limitations period. Nonetheless, as in *Callahan,* the court treated the merits of a range of claims concerning ineffective assistance of counsel. As it summarized the endeavor, "we have reviewed each and every allegation of ineffective assistance of counsel and have found either that the allegation is without merit or that Jones failed to prove it." *Id.* at 1199. On other claims, the *Jones* court applied procedural bars other than the statute of limitations. *Id.* at 1205-1206.

Although the court granted relief in neither *Callahan* nor *Jones,* its extensive and manifold analysis of the petitioners' ineffective assistance claims makes clear that relief would have been proper if compelled by the substantive law addressing the Sixth Amendment right to counsel. The state contends that *Jones* and *Callahan* do not show that Alabama courts were authorized to dispense with the statute of limitations, but merely demonstrate that the court failed to notice the limitations period's expiration in these particular cases. The possibility that the court neglected in these cases to confirm the petitions' timeliness, however, actually demonstrates the very point we find most relevant in our "properly filed" inquiry: untimeliness did not mandate a petition's dismissal, but rather was a matter within the court's discretion to ignore. We note that the lengthy opinions published by the Court of Criminal Appeals in *Jones* and *Callahan* set forth comprehensive legal analyses. This approach does not suggest a decisional process in which

the court simply seized upon a ground other than the statute of limitations as the most efficient means to dispose of the claims before it. We instead discern in these cases a resolve on the appeals court's part to address the procedural and substantive aspects of the petitioners' cases in full. The comprehensive analyses set forth reflect, if not necessarily a deliberate decision to permit untimely filing, at least an awareness that untimeliness, were it shown, would not compel the court to refrain from a sustained treatment of the merits. It thus can no more be said that the court failed to notice the running of the statute than that it chose to disregard it.

In this case, the issue of timeliness first arose some three years after Siebert filed his petitions. The circuit court rejected Siebert's argument that the state had waived the statute of limitations defense by failing to plead it sooner. Under the "relation back" doctrine, it held, the state should be allowed to raise the time bar since Siebert had been allowed to amend his own petitions. The Alabama Court of Criminal Appeals upheld this ruling, but it did so on the basis of the circuit court's discretionary authority to allow amendments to pleadings, without determining whether the state was entitled as a matter of law to the benefit of a statute-of-limitations defense. Although the court rejected Siebert's argument that the state waived the defense by not raising it in its "first responsive pleading," the court treated waiver as a question of Siebert's right to timely notice rather than of any state entitlement. *Siebert,* 778 So. 2d at 847-48 (concluding that "Siebert had timely notice of the State's intention to rely on the statute of limitations defense" in addressing waiver issue) (quoting circuit court opinion). While Siebert thus could not demand that he be exempted from the time bar's application, the appeals court's analysis makes clear that enforcement of the limitations period was committed to the circuit court's discretion. This is apparent from its citation of rules providing that "[a]mendments to pleadings *may* be permitted at any stage of the proceedings

prior to the entry of judgment," and that a court "*may* summarily dismiss" a petition when, "assuming the allegations of the petition to be true, it is obviously without merit or is precluded." *Id.* at 848 (citing Ala. R. Crim. P. 32.7(d) and quoting *Burton v. State*, 728 So. 2d 1142, 1147-48 (Ala. Crim. App. 1997)) (additional citations omitted) (emphasis added).[10] The court concluded this portion of its discussion by explaining that "the trial court could have dismissed the petition on procedural grounds even without any response from the State." *Id.*

Because of the role of judicial discretion in the limitations period's application in this case, we need not presently decide what effect untimeliness would have on the "properly filed" inquiry were the state to have pled the limitations period in a manner clearly recognized by Alabama's courts to secure its entitlement to rely on this defense. Here, the time bar's application was not a matter of state entitlement but of court discretion, and the same discretion relied upon to impose the time bar could also have afforded a basis to reach the merits of Siebert's claims, as *Howard, Jackson, Callahan*, and *Jones* make clear. It cannot be said that Alabama law required the courts to refrain from adjudicating the merits of the claims raised in Siebert's untimely petitions. We turn then to the question of what bearing a time bar within a court's discretion to impose has

---

[10] In *Siebert*, the court also cited a rule providing that "[l]eave to amend shall be freely granted." Ala. R. Crim. P. 32.7(d). The appeals court appears to have been referring, however, to the leave granted Siebert to amend his own petitions shortly before the evidentiary hearing convened some three years after his original filing. The next sentence of its decision reads: "The granting or denial of a motion to amend a Rule 32 *petition* is within the sound discretion of the trial court, whose ruling on such a motion will be reversed only for an abuse of discretion." *Siebert*, 778 So. 2d at 848 (emphasis added) (citation omitted). We thus cannot read the appeals court's enunciation of a "freely granted" standard to suggest any qualification of the main thrust of its reasoning, which, as described in the text, recognized the circuit court's discretion to allow the state to raise the time bar.

on the question of proper filing under *Artuz*.

III. Discretionary Time Bars as "Conditions to Obtaining Relief"

We are unable to locate any authority addressing the intersection between AEDPA's tolling provision and statutes of limitation *permitting* courts, in their discretion, to examine the merits of claims raised in late petitions. Cases applying the tolling provision in other circuits have predominantly addressed state rules *requiring* courts to determine whether an exception to a limitations period applies. Two of three circuits to have addressed this issue have held that failure to meet a filing deadline will not prevent a petition from tolling AEDPA's limitations period if the state time bar provides exceptions that cannot be applied without at least a limited merits assessment. *Dictado v. Ducharme,* 244 F.3d 724, 727-28 (9th Cir. 2001) (reversing earlier decision, after stay of mandate, in light of Supreme Court's intervening *Artuz* decision); *Smith,* 209 F.3d at 385; *see also Habtesalassie,* 209 F.3d at 1211 n.3 (reserving similar question). These courts have reasoned that since the existence of such exceptions assures at least some level of judicial review of claims raised in late petitions, timeliness is better regarded as a condition to obtaining relief than a condition to filing. *See Dictado,* 244 F.3d at 727-28; *Smith,* 209 F.3d at 385.

The Seventh Circuit has criticized this approach in holding that Illinois' statute of limitations, by permitting late filings on the part of petitioners able to satisfy what the Seventh Circuit characterized as a "miscarriage of justice" standard, does not render all untimely petitions "properly filed." *Brooks v. Walls,* 279 F.3d 518, 521 (7th Cir. 2002), *aff'd on reh'g,* 301 F.3d 839, *cert. denied,* 538 U.S. 1001, 123 S. Ct. 1899, 155 L.Ed.2d 829 (2003). Although the court acknowledged that such a rule requires "at least a sidelong glance at the merits," it characterized the exception as an escape valve for "plain error." *Id.* at 521, 523. The court then reasoned that a state court decision finding (1) that a

petition is untimely, and (2) that no miscarriage of justice requires its entertainment, is of a form traditionally recognized to rest on "adequate and independent state grounds" sufficient to preclude collateral federal review. *Id.* at 523-24. The Seventh Circuit accordingly held that a petition dismissed as untimely by the Illinois courts had not tolled AEDPA's one-year limitations period.

In this case, we believe the discretion left to Alabama courts to enforce the time bar compels the conclusion that timeliness was not a prerequisite to filing *per se*. Since the courts' discretion meant a petition might be entertained even when filed late, the two-year deadline did not create a "timely *filing requirement*." *Artuz*, 531 U.S. at 9 n. 2, 121 S. Ct. 361 (emphasis added). Rather, the very exercise of discretionary authority, regardless of whether or not to excuse lateness, is itself a sufficient quantum of judicial review to show that Alabama courts deemed the form and manner of a petition's filing sufficient to trigger their own authority to act upon claims raised therein. At least in those instances where the courts treated the state as having failed to secure any entitlement to rely on the statute of limitations as a defense, timeliness was not among the conditions required for such discretion. Accordingly, compliance with Rule 32.2(c)'s two-year deadline should be regarded as a condition to obtaining relief rather than a condition to filing, and we cannot say that the deadline was among the "laws and rules governing filings" of Rule 32 petitions. *Id.* at 8, 121 S. Ct. 361.

Our approach is consistent with the Fifth Circuit's in *Smith*. As with the Louisiana law considered in that case, timeliness under Ala. R. Crim. P. 32.2(c) was not a "prerequisite[ ]" that had to be satisfied before Alabama courts would "allow a petition to be filed and accorded *some level* of judicial review." *Smith*, 209 F.3d at 384 (quoting *Villegas v. Johnson*, 184 F.3d 467, 470 n. 2 (5th Cir. 1999) (emphasis supplied in *Smith*)). The Fifth Circuit's refinement of its approach comes nearest to our present task in *Emerson*

v. Johnson, 243 F.3d 931 (5th Cir. 2001), a case decided after *Artuz* and *Smith*. There, the court considered a Texas statute that forbade state habeas petitioners from filing motions for reconsideration, but which Texas courts, by entertaining such motions, had ignored on several occasions. *Id.* at 934-35. Citing "the *Artuz* Court's broad reading of the phrase 'properly filed,'" the Fifth Circuit held that a petitioner's motion for reconsideration, although forbidden by statute, was nonetheless properly filed. *Id.* at 935. The Texas law considered in *Emerson* bore two important resemblances to Alabama's formerly discretionary time bar. First, the courts' occasional neglect of the statute was not pursuant to any equitable exception they might have created to mitigate a rule of doubtlessly harsh consequence. Rather, the rule's non-application was simply an unexplained practice evidenced by three cases in which the Texas courts had entertained motions for reconsideration.[11] As read by the Fifth Circuit, the opinions published in these cases offered no reason for disregarding the statutory bar. Second, the procedural histories of these Texas cases, as recounted by the Fifth Circuit, did not end in vacations of conviction or dismissals of sentences. For the purpose of the "properly filed" inquiry with which the Fifth Circuit was concerned, it was sufficient that the Texas courts, by entertaining motions for reconsideration, had "provided state habeas petitioners with the hope that a motion or suggestion for reconsideration may be successful." *Id.* at 935.

The same must be said of Alabama courts' one-time discretion to entertain untimely petitions. The entertainment of late petitions in *Howard, Jackson, Jones*, and *Callahan* provided prisoners with "some level of judicial review." *Smith*, 209 F.3d at 384. Although the practice reflected in these cases was hardly a guarantee, it did provide Alabama prisoners with the hope that a petition, even if filed late,

---

[11] The Fifth Circuit also noted that it could find no case in which the Texas courts had held the statutory bar to prohibit the filing of a motion for reconsideration. *Emerson*, 243 F.3d at 935.

could be successful. Such petitions must in our view be regarded as "properly filed."

Our treatment of Alabama's formerly discretionary time bar is also consistent with the Seventh Circuit's application of AEDPA's tolling provision in *Brooks*. In an opinion affirming the *Brooks* decision on rehearing, the Seventh Circuit panel revisited a hypothetical set forth in its first decision, whereby state law might provide that "any meritorious filing" would be deemed timely. *Brooks v. Walls*, 301 F.3d 839, 841 (7th Cir. 2002). The court explained that "the only sensible understanding" of such a rule "would be that every collateral attack was timely for purposes of state law, *because every one was enough to precipitate a decision on the merits.*" *Id.* (emphasis added). In Alabama at the time of Siebert's Rule 32 proceedings, an untimely petition was "enough to precipitate a decision on the merits," at least in the category of cases, like this one, in which the courts treated the two-year time bar as a condition within their own discretion to apply. *Howard, Jackson, Jones*, and *Callahan* provide examples of merits determinations precipitated by untimely petitions.

We need go no further in addressing the doctrine of adequate and independent state grounds discussed in *Brooks*. As the Seventh Circuit explained, this doctrine has been applied in cases assessing whether a federal habeas petitioner's procedural default of state remedies precludes collateral federal review absent a showing of "cause" and "prejudice." *Brooks*, 279 F.3d at 523 (citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977)). Unlike the highly intricate rules governing procedural default, which articulate a judicially crafted doctrine aiming broadly to reconcile the rights of criminal defendants and the role of federal courts with the authority of states and state courts, the application of AEDPA's tolling provision is a comparatively straightforward enterprise predicated on the plain meaning of the phrase "properly filed." In *Artuz*, the Court rejected arguments pertaining to the federalism-related

"object of § 2244(d)(2)" in favor of resolving the case on the basis of "the only permissible interpretation of the text-which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz*, 531 U.S. at 10, 121 S. Ct. 361.

In light of this instruction that controlling force be given to the literal meaning of the phrase "properly filed," we find it dispositive that the exercise of discretion to enforce or not enforce a post-conviction time bar itself constitutes a sufficient quantum of judicial review to effectively ratify the form and manner of a petition's filing. When a petition has thus empowered a court to act directly upon the claims it raises, we believe it must be regarded as "properly filed." Accordingly, we hold that Siebert's non-compliance with Rule 32's time bar, since it was treated by the Alabama courts as immaterial to their own authority to act upon his claims, did not render his post-conviction applications "[im]properly filed."

Since timeliness is the only issue raised by the state in arguing that Siebert failed to comply with the laws and rules governing filings under Rule 32, we conclude that his petitions were "properly filed" within the meaning of § 2244(d)(2). An application for post-conviction relief, once properly filed, remains "pending" for the purpose of tolling the one-year federal limitations period until the final disposition of any appeals to higher state courts. *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 2138, 153 L.Ed.2d 260 (2002); *Moore v. Crosby*, 321 F.3d 1377, 1380 (11th Cir. 2003) ("It is clear that tolling continues under section 2244(d)(2) while the petitioner appeals the denial of a state application in state court."). AEDPA's limitations period was therefore tolled in Siebert's case from the date of the statute's enactment, at which time his Rule 32 petitions were already pending, until September 15, 2000, when the Alabama Supreme Court denied discretionary review of the Alabama Court of Criminal Appeals' decision upholding the

denial of relief. Because Siebert filed his federal habeas petitions on September 14, 2001, his petitions were filed within one year of the limitations period's commencement. They were thus timely under § 2244(d)(1), and the district courts are due to be reversed.

CONCLUSION

For the foregoing reasons, we VACATE the district court orders dismissing Siebert's petitions and REMAND for further proceedings consistent with this opinion.

VACATED AND REMANDED.

FILED
2006 Feb-09 AM 09:43
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DANIEL SIEBERT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 1:01-cv-2323-IPJ-TMP
	)	
	)	
DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Talledega County Circuit Court on March 19, 1987, for capital murder, for which he was sentenced to death. The petitioner, Daniel Siebert,[1] with the assistance of an attorney, filed the instant petition for writ of *habeas corpus* on September 14, 2001. He is incarcerated

[1] In all trial court proceedings, the petitioner's first name was spelled "Danial," but the appellate courts and petitioner's counsel, in the petition for writ of *habeas corpus* filed here, spell the name "Daniel."

on Death Row at Holman Correctional Facility in Atmore, Alabama. The sole issue addressed in this opinion is whether, in light of the complex procedural history of the case and changes in controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit, petitioner's state Rule 32 petition was "properly filed" for purposes of tolling the one-year limitation for filing federal *habeas* actions found at 28 U.S.C. § 2244(d).

I. PROCEDURAL HISTORY IN FEDERAL COURT

On September 14, 2001, the petitioner, represented by counsel, filed the instant *habeas corpus* petition. Petitioner filed an amended petition on October 26, 2001. On February 5, 2002, the respondents filed an answer and a motion to dismiss supported by a memorandum of law, contending that the petition is time-barred by operation of 28 U.S.C. § 2244(d)(1).[2] On March 20, 2002, respondents filed a supplemental memorandum of law, and petitioner filed a response to the motion to dismiss on May 6, 2002. The court entered a memorandum opinion and order on September 30, 2002, granting the respondents' motion to dismiss and dismissing the petition as time-barred. Petitioner appealed to the Eleventh Circuit Court of Appeals. The appellate court issued its mandate on December 4, 2003,[3] vacating and remanding, holding that the *habeas* petition was not time-barred because it was "properly filed" within the meaning of that term as explained by the Supreme Court in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213

---

[2] Respondents also raise issues of procedural default. Because the petition clearly is time-barred, the court need not address any other issue.

[3] The opinion, published as *Siebert v. Campbell*, 334 F.3d 1018,1032 (11th Cir. 2003), vacated and remanded both the instant case and another *habeas* action Siebert filed in the District Court of the Middle District of Alabama, challenging his death sentence for three other murders. It will be referred to hereinafter as "Siebert I."

(2000). *See Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003).

Following the announcement of the Supreme Court's decision in *Pace v. DiGuglielmo*, __ U.S. __, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), on April 27, 2005, the respondents filed a renewed motion to dismiss on May 11, 2005, contending that *Pace* severely undermined the rationale in *Siebert*, requiring this court to dismiss on time-bar grounds, notwithstanding the mandate from the Court of Appeals. Petitioner filed a response on June 13, 2005, and respondents filed a reply on July 11, 2005. By order dated August 31, 2005, the court noted that the Eleventh Circuit Court of Appeals had mentioned the instant case in its unpublished opinion in *Colbert v. Head*, 146 Fed. Appx. 340, 344-345 and n.4 (11th Cir. 2005), and the order directed the parties to file any additional authority or argument related to the application of *Pace* to the instant motion in light of *Colbert*. On September 12, 2005, petitioner and respondents filed memoranda in response to the order.

II. PROCEDURAL HISTORY IN STATE COURT

On March 19, 1987, the petitioner was convicted after a jury trial for the capital murder of Linda Ann Jarman[4] during the course of a robbery.[5] The jury recommended that petitioner be sentenced to death, and on April 17, 1987, the trial judge sentenced petitioner to death by electrocution. Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed on April 14,1989. *Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989). On March 30, 1990, the Alabama Supreme Court affirmed the decision of the appellate court. *Siebert v. State*, 562 So. 2d 600 (Ala. 1990). A certificate of judgment was issued by the Alabama

---

[4] The victim's name is spelled "Jarmin" in some state court documents.

[5] In a separate trial held in Lee County, after a motion for change of venue was granted in the Talladega County Circuit Court, Siebert subsequently was convicted of capital murder in connection with the strangulation deaths of Sherri Weathers and her two young sons.

Court of Criminal Appeals on May 22, 1990. The court did not send a copy to the petitioner, but did send a copy to the Talladega County Circuit Court. On November 5, 1990, the United States Supreme Court denied petitioner's application for writ of *certiorari*. *Siebert v. Alabama*, 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 408 (1990).

On or about August 25, 1992,[6] petitioner filed a petition for post-conviction relief in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.[7] The state filed an answer on October 15, 1992, and did not raise the defense that the petition was time-barred. The trial court conducted evidentiary hearings on petitioner's claims of ineffective assistance of counsel on April 3-5, 1995, and on September 26, 1995. On April 4, 1995, the state amended its answer and raised for the first time the defense that the petition was untimely filed. On December 30, 1998, the court ruled that the Rule 32 petition was untimely filed pursuant to Alabama Rule of Criminal Procedure 32.2(c). The court also addressed the petition on the merits and denied all claims. Petitioner appealed to the Alabama Court of Criminal Appeals, which affirmed the denial on December 30, 1999. *Siebert v. State*, 778 So. 2d 842 (1999). The Alabama Supreme Court denied *certiorari* on September 15, 2000. *Siebert v. State*, 778 So. 2d 857 (Ala. 2000). Petitioner did not seek review in the United States Supreme Court.

---

[6] The parties refer to the filing date as August 24, 1995. The document attached as defendants' Exhibit 36 shows a date stamp of August 25, 1995. The precise date is not material, however, to the ultimate resolution of this matter.

[7] The Rule 32 petition arising from his conviction for the murder of Jarman was ultimately consolidated in Talledega County Circuit Court with the Rule 32 petition challenging his conviction in Lee County for the murders of Weathers and her two children.

III. TIMELINESS

A. Law-of-the-Case Doctrine

The first question the court must address is whether the issue of timeliness of the filing of the instant *habeas* petition may be revisited in light of *Pace*, or whether the law-of-the-case doctrine requires the court to deem the petition timely filed and address it on the merits. While it is well settled under the law-of-the-case doctrine that the determination of "an issue decided at one stage of a case is binding at later stages of the same case," *Schiavo v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005), there are established exceptions to that general rule. The doctrine, designed to promote the efficiency of the judicial process and to provide certainty and finality to matters litigated, also must provide for just and correct adjudications of fact and law. *See, e.g., Klay v. All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004), citing *Burger King Corp. v. Pilgram's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994). Thus, an exception exists when "controlling authority has been rendered that is contrary to the previous decision." *Schiavo*, 403 F.3d at 1292. As discussed below, *Pace* constitutes controlling authority that is contrary to the previous decision of the Eleventh Circuit Court of Appeals in *Siebert*. Accordingly, the law-of-the-case doctrine does not prevent a reexamination of the issue in light of the new authority.

B. Application of *Pace*

The respondents assert that the proclamation made by the Supreme Court in *Pace* constitutes a change in law on a controlling issue; accordingly, the court must examine whether the intervening decision affects the mandate to treat Siebert's petition as timely filed. Petitioner argues that *Pace* is inapplicable and that his claims must be reviewed on the merits.

There is no dispute among the parties, or in the mandate issued by the Eleventh Circuit Court of Appeals, that the

instant petition is untimely under a strict reading of Section 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which establishes a one-year deadline for the filing of *habeas* actions under § 2254 challenging the validity of state criminal convictions. Unless the Rule 32 petition filed in state court counts to toll the running of the one-year limitation, almost eleven years of untolled time elapsed between the date the Supreme Court denied *certiorari* on direct appeal in 1990 and the date petitioner filed the instant *habeas* petition in 2001. What petitioner argues, and what the Eleventh Circuit Court of Appeals held when remanding this matter, is that the limitation period is subject to tolling under § 2244(d)(2), which states:

> (2) The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. [Italics added].

Subsection 2244(d)(2) provides for the tolling of the limitation period during those times the petitioner has pending a "properly filed" post-conviction petition in state court. If, as the appellate court determined in its 2003 mandate, petitioner's Rule 32 petition was "properly filed," the *habeas* petition is timely because the time from the enactment of the AEDPA until September 15, 2000, was tolled by the pendency of the Rule 32 petition, and petitioner filed the instant petition within one year after that date. On the other hand, if the untimeliness of the Rule 32 petition prevents it from being characterized as "properly filed" under the definition set forth in *Pace*, there was no tolling of the federal habeas limitation, and the petitioner's claims are time-barred.

In the nine years since the enactment of the AEDPA, the issue of whether a post-conviction petition is "properly filed" has been examined in different contexts, as was discussed in this court's earlier memorandum opinion dismissing the

petition. As of the date the mandate was issued in this case, the controlling law was set forth in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000), in which the Court affirmed the Second Circuit Court of Appeals and determined that a state post-conviction petition that contained claims that were procedurally barred was nonetheless "properly filed." It is important to note that *Artuz* did not involve the assertion that the state collateral petition was procedurally defaulted because it was not timely filed; the alleged procedural defaults were of a different nature. Nevertheless, in rejecting the argument, the Supreme Court noted that conditions for proper filing include "the form of document, *the time limits upon its delivery*, the court and office in which it must be lodged, and the requisite filing fee." *Id.* at 8, 121 S. Ct. at 364 [Italics added].

On April 27, 2005, the Supreme Court had the opportunity to expound on *Artuz* in the specific context of time limits for filing. In *Pace v. DiGuglielmo*, ___ U.S. ___, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), the Court held that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered "properly filed" within the meaning of the AEDPA's tolling provision. The court stated simply: "[W]e hold that time limits, *no matter their form*, are 'filing' conditions." *Id.* at ___, 125 S. Ct. at 1814 [italics added]; *see also Anderson v. Attorney General of Florida*, 135 Fed. Appx. 244, 246 (11th Cir.2005), *cert. denied*, 126 S. Ct. 835 (2005).

In *Pace*, the Court decided whether the untimely filing of a post-conviction petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA") could serve to toll the AEDPA one-year limitation. The governing Pennsylvania statute provided that post-conviction petitions must be filed within one year from the date the conviction becomes final, but further provided three exceptions to the timebar when: (1) governmental interference prevents filing; (2) new constitutional rules are made retroactive; or (3) new facts arise that could not have been discovered through due

diligence. *Pace*, 125 S. Ct. at 1810 n.1. After the petitioner in *Pace* filed a post-conviction petition that was dismissed as without merit, petitioner appealed. The respondents raised the issue of timeliness, which the petitioner disputed, but the state appellate court held that the post-conviction petition was untimely filed. *Id.* at 1810-11. Pace then sought relief from his convictions in a federal *habeas* action. A magistrate judge recommended that the petition be dismissed as time-barred, but the district court held that the petitioner was entitled to both statutory and equitable tolling. *Id.* at 1811. As described by the Supreme Court, the district court "reasoned that because the PCRA set up judicially reviewable exceptions to the time limit, the PCRA time limit was not a 'condition to filing' but a 'condition to obtaining relief' as we described those distinct concepts in *Artuz v. Bennett*, 531 U.S. 4, 11, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000)." *Pace*, 125 S. Ct. at 1811. On appeal, the Court of Appeals for the Third Circuit reversed, reasoning that the time limitation provided by the Pennsylvania statute constituted a "condition to filing," and that an untimely petition could not be "properly filed." *Pace*, 125 S Ct. at 1811.

When *Pace* reached the Supreme Court, the Court reviewed the question that was raised but not decided in *Artuz*: "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Pace*, 125 S. Ct. at 1811. The Court determined that, regardless of whether the state's statutory scheme provided exceptions to the post-conviction petition deadline, there exist "no grounds for treating the two differently." *Id.* The court went on to explain:

> As in *Artuz*, we are guided by the "common usage" and "commo[n] underst[anding]" of the phrase "properly filed." *Id.* at 8, 9, 121 S. Ct. 361. In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to

> that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception. The purpose of AEDPA's statute of limitations confirms this commonsense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

Id. at 1811-12. The Court further explained that, when the state courts hold that a post-conviction petition is untimely under state law, "'that is the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 1812.

The Court's discussion in *Pace* of its earlier decision in *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), is illuminating. The Court wrote:

> *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), points to the same conclusion. In *Saffold*, we considered whether § 2244(d)(2) required tolling during the 4 1/2 months between the California appellate court's denial of Saffold's postconviction petition and his further petition in the California Supreme Court. The California Supreme Court denied the petition "on the merits and for lack of diligence," which raised the question whether that court had dismissed for lack of merit, for untimeliness, or for both. *Id.*, at 225, 122 S. Ct. 2134 (internal quotation marks omitted). Although we ultimately remanded, we explained that, "[i]f the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was 'unreasonable,'" *i.e.*, untimely, "*that would be the end of the matter*, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.*, at 226, 122 S. Ct.

> 2134 (emphasis added); *see also id.*, at 236, 122 S. Ct. 2134 (KENNEDY, J., dissenting) ("If the California court held that all of [Saffold's] state habeas petitions were years overdue, then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period"). What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, "that [is] the end of the matter" for purposes of § 2244(d)(2).

Pace v. DiGuglielmo, ___ U.S. ___, ___, 125 S. Ct. 1807, 1812, 161 L. Ed. 2d 669 (2005). This reference to *Saffold* makes clear that, regardless of whether the state courts alternatively address the merits of an untimely filed petition, the time limit itself is a "condition to filing," which, if not met, prevents the state petition from being timely filed for purposes of tolling the federal *habeas* limitation at § 2244(d). The definition of "properly filed" under *Pace* does not include a time-barred state post-conviction petition, even if it ultimately is reviewed on the merits in the state court, so long as the state court has deemed it untimely. *Pace*, 125 S. Ct. at 1815-16 (J. Stevens, dissenting).

In this case, petitioner filed his Rule 32 post-conviction motion in the state trial court on August 25, 1992. Upon motion of the respondents, the trial court dismissed the petition as untimely filed pursuant to Rule 32.2(c), noting that the certificate of judgment following petitioner's direct appeal was issued by the Alabama Court of Criminal Appeals on May 22, 1990, making any Rule 32 petition filed later than May 21, 1992, untimely.[8] The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court

---

[8] Alabama Rule of Criminal Procedure 32.2(c) in effect at the time governing petitioner's motion prescribed a limitation period requiring any Rule 32 petition to be filed "within two years after the issuance of the certificate of judgment by the Court of Criminal Appeals." Since then, the time limit has been shortened to one year, consistent with § 2244(d).

denied *certiorari* on September 15, 2000. Thus, the state courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed. Although the trial court examined petitioner's Rule 32 claims on the merits in addition to finding the claims time-barred, the Alabama Court of Criminal Appeals expressly held that the trial court should not have addressed the barred claims on the merits, as such an examination is not permitted by the Alabama rule.[9] The petition contained no allegations of newly discovered evidence that might trigger the six-month exception to the two-year rule. Likewise, in his appeal from the denial of his Rule 32 petition, petitioner did not assert that, because his claims were premised upon newly discovered evidence, he was entitled to an extension of time in accordance with Alabama Rule of Criminal Procedure 32.2(c).

In his response to the current motion to dismiss, Siebert contends that *Pace* is inapposite because the Pennsylvania statute at issue was not "insufficiently established or inconsistently applied." (Petitioner's Response at p. 5). This argument confuses the issue of timeliness under the statutory tolling provision and whether the state court's adjudication of timeliness is due deference in the context of a procedural default. *See, e.g., Dugger v. Adams*, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). The issue in this case is simply one of statutory interpretation: whether the untimely Rule 32 petition meets the "properly filed" requirement of § 2244(d)(2). It is true that the Eleventh Circuit's opinion in *Siebert* stated for the first time that state procedural rules must be "firmly established and regularly followed" to be honored for purposes of interpreting the "properly filed"

---

[9] Rule 32.2(c) specifically states that the court "shall not entertain any petition for relief" that is untimely, as opposed to simply precluding the court from granting the relief, which further makes clear that the statute of limitation is a "condition of filing" as discussed in *Artuz* and *Pace*.

standard for tolling, but this holding, at least in the context of time limits for filing, is undermined by *Pace* for the reasons now being addressed. In fact, in a pre-*Pace* case, the Court of Appeals appears to have clarified the *Siebert* holding that, to be "firmly established and regularly followed," the time limit for filing must be jurisdictional. As Judge Carnes wrote in *Hurth v. Mitchem*, which examined the Eleventh Circuit Court of Appeals' reasoning in *Siebert I*:

> The purpose and function of the "properly filed" requirement of § 2244(d)(2) is different from that of the procedural bar doctrine. *Artuz v. Bennett*, 531 U.S. 4, 9, 121 S. Ct. 361, 364, 148 L. Ed. 2d 213 (2000) ("[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar."); *see also Estes v. Chapman*, 382 F.3d 1237, 1239 (11th Cir. 2004) (discussing *Artuz*); *Wade v. Battle*, 379 F.3d 1254, 1259-60 (11th Cir. 2004) (quoting *Artuz*).

Hurth, 400 F.3d 857, 862 (11th Cir. 2005).[10] The Court further noted that "[n]owhere in *Siebert* did we hold, state, or imply that Rule 32.2(c) was not firmly established and regularly followed (as a non-jurisdictional rule) [for purposes of procedural default] by the Alabama courts before *Williams*." *Id.* Such findings, the Court explained, relate to federal *habeas* procedural bar purposes, but not to the issue presented by *Siebert*, which is the different animal of statutory tolling. *Id.* at 861-863.

The court believes that *Pace* effectively overruled *Siebert*, mandating, instead, that state time limits for filing post-conviction petitions are "conditions to filing," and not merely "conditions to obtaining relief," and that, regardless

---

[10] *Hurth* was announced on February 16, 2005, before *Pace* was announced on April 27, 2005. Thus, the *Hurth* Court did not have the benefit of the Supreme Court's reasoning in *Pace*.

of whether the state court also addresses the merits of an untimely filed state petition, once the state court determines that the state petition was untimely filed, that "ends the matter" as far as considering the petition "properly filed" for tolling under § 2244(d). The essential rationale of *Siebert* – that, because the Alabama state courts occasionally addressed the merits of time-barred petitions before 2000, the time limitation of Rule 32.2(c) was a "condition to obtaining relief," rather than a "condition to filing," – simply cannot be squared with *Pace* and its reference to *Saffold*. The Supreme Court cannot state more clearly than it did in *Pace* that "time limits, *no matter their form*, are 'filing' conditions." *Pace*, 125 S. Ct. at 1814. Siebert's focus on whether the time limitation in Rule 32.2(c) was "jurisdictional" is meaningful only in determining whether the time limitation was a "condition to filing" or a "condition to obtaining relief." The *Siebert* court concluded that, because the time limitation was not "jurisdictional" before 2000, it only limited the state court's ability to grant relief, not its ability to accept an untimely petition for filing. Nothing in *Pace* or § 2244(d), however, says that only "jurisdictional" rules constitute "conditions to filing." Indeed, many of the "conditions to filing" identified by the Supreme Court in *Artuz* – the form of the pleading and the payment of a filing fee – are not jurisdictional in the sense that the court lacks the power to deal with the matter. More to the point, the Supreme Court itself, in *Pace*, identified Alabama's time bar as one of the very types of rules that constitute "conditions to filing." The Court explained:

> The dissent suggests that our conclusion in *Artuz*, that state procedural bars "prescrib[ing] a rule of decision for a court" confronted with certain claims previously adjudicated or not properly presented are not "filing" conditions, requires the conclusion that the time limit at issue here also is not a "filing" condition. *Post*, at 1819; *see Artuz v. Bennett*, 531 U.S., at 10-11, 121 S. Ct. 361 (discussing N.Y. Crim. Proc. Law §§

> 440.10(2)(a) and (c) (McKinney 1994)). The dissent ignores the fact that *Artuz* itself distinguished between time limits and procedural bars. 531 U.S., at 8-10, 121 S. Ct. 361. For purposes of determining what are "filing" conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of "rule of decision" procedural bars at issue in *Artuz*, which go to the ability to obtain relief. [FN7].

Id. at ___, 125 S. Ct. at 1814. At footnote seven, the Court then gives examples of the types of state procedural rules that constitute "conditions to filing," explicitly identifying Alabama's Rule 32.2(c) time limit as one. Footnote seven in *Pace* reads:

> FN7. *Compare, e.g.*, Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth v. Fahy*, 558 Pa. 313, 328, 737 A.2d 214, 222 (1999) (describing the time limit as "jurisdictional"); *2 Ala. Rule Crim. Proc. 32.2(c) (2004-2005) (stating that a court "shall not entertain" a time-barred petition),* with 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004-2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz*, are present). [Italics added for emphasis].

Id. at ___, 125 S. Ct. at 1814 n.7. Plainly, the Supreme Court considered Alabama's Rule 32.2(c) to be the type of rule that is a "condition to filing," violation of which would preclude

the petition from being "properly filed" for 2244(d)(2) purposes.

Because *Pace* is controlling contrary authority, the mandate issued in *Siebert* does not preclude the court from again considering the timeliness of the instant *habeas* petition. Because the Alabama state courts clearly and explicitly found Siebert's 1992 Rule 32 petition to be untimely filed, this court has no option but to conclude that it was not "properly filed" for purposes of tolling the § 2244(d) time limitation. Accordingly, *Pace* compels the conclusion that Siebert's petition must be dismissed as untimely.

C. Effect of *Colbert*

Finally, the court also believes that the Eleventh Circuit's unpublished opinion in *Colbert v. Head*, 146 Fed. Appx. 340 (11th Cir. 2005), does not require a different result. *Colbert* is the only case involving this question decided by the Eleventh Circuit Court of Appeals after the Supreme Court announced *Pace*. But, for the reasons explained below, *Colbert* cannot be read as a binding statement of authority, at least with respect to application of *Pace* to Alabama's Rule 32.2(c) time limitation.

After *Pace*, it appeared clear that the untimely state petition filed by Siebert could not be used to toll the § 2244(d) limitation. Even so, in *Colbert v. Head*, the Court of Appeals quoted its earlier opinion in *Siebert* for the proposition that the state's "consistent application" of its own procedural rules must be present before the rules are due deference. *Colbert*, 146 Fed. Appx. at 344. The court wrote in *Colbert* the following about *Siebert*:

> In interpreting *Artuz*, we have concluded that we must give "due deference" to state procedural rules governing whether a § 2244(d)(2) application is "properly filed," with the caveat that the state rule be "firmly established and regularly followed." *Wade*, 379 F.3d at 1259-60. In *Siebert v. Campbell*, 334

> F.3d 1018, 1025 (11th Cir. 2003), we examined whether § 2244(d)(2)'s tolling provisions were applicable when a state habeas court had found that the petitioner's application for habeas relief was precluded by a state statute of limitations. *Id.* at 1021. We discussed that:
>
> > The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice.
>
> *Id.* at 1025. Thus, after determining that the state rule at issue was not "firmly established and regularly followed" at the time of the petitioner's state habeas filing, we concluded in *Siebert* that the rule should not be given deference. *Id.* at 1025-29.

Id. at 344. At first blush, this reference to *Siebert I* might indicate that the Eleventh Circuit Court of Appeals does not interpret *Pace* as having any application here. Upon closer examination, however, this court is convinced that the reference to *Siebert I* does not constitute binding authority regarding the issue of timeliness in the instant matter because *Colbert* is an unpublished opinion with no precedential force and, even within the context of *Colbert*, it is *dicta*.

First, *Colbert* is an unpublished opinion and thus provides no binding precedent. *See* Eleventh Circuit Court of Appeals Rule 36-2, which states in part, "Unpublished opinions are not considered binding precedent." Second, the reference to *Siebert* in *Colbert* is *dicta*. *Colbert* dealt with the question whether, under Georgia law, the filing of a motion to withdraw a guilty plea after the end of the term of court in which the guilty plea was entered was "properly filed" for purposes of tolling § 2244(d). The Court of Appeals concluded that, because the state court had no

jurisdiction to act on such a motion, the motion was not "properly filed." This says nothing about the effect of the time limitations for filing Rule 32 petitions under Alabama law. A determination that Alabama's Rule 32.2(c) limitation was not jurisdictional until 2000 was not necessary to a resolution of the Georgia procedural question. Thus, even though *Siebert* is mentioned in passing, it was not necessary to the resolution of the question presented in *Colbert*.

Accordingly, this court must be guided by the clear holding in *Pace*. Because the United States Supreme Court has clearly stated that a state court's determination that a petition for post conviction relief is untimely constitutes the "end of the matter," petitioner's argument that he is entitled to statutory tolling is unavailing. *Pace* constitutes an intervening controlling authority regarding the very issue presented here – the meaning of "properly filed" in § 2244(d)(2). Under *Pace*, the untimely state petition filed by Siebert was not a "properly filed application" capable of tolling the limitation. Petitioner's *habeas* petition therefore is time-barred pursuant to § 2244(d)(l), and the motion to dismiss is due to be granted.

CONCLUSION

The court has not undertaken the task at hand lightly or with disrespect toward the mandate of the Court of Appeals. The court is well aware of its obligation to follow the law, including the law of the case when it applies. The court is mindful of the high stakes involved for the petitioner, who is facing a sentence of death and whose post-conviction claims have gone unheard so far. Nevertheless, the court is sworn to uphold the law – all of the law – even when doing so may seem unfair and harsh. The only tools the court may work with are those given it by Congress, the Supreme Court, and the Court of Appeals, and the court is obligated to harmonize those tools in arriving at an outcome dictated by the law. Using those tools, the court believes that *Pace* requires a second look at *Siebert*.

Accordingly, for the reasons stated above, the court finds that the petition for writ of *habeas corpus* under 28 U.S.C. § 2254 is due to be dismissed with prejudice as time-barred by 28 U.S.C. § 2244(d). Petitioner, with the assistance of counsel, waited until September 2001 to file the instant *habeas* petition, more than five years after the limitation period was enacted in 1996. The Rule 32 petition pending at the time the AEDPA became law did not act to toll the running of the limitation period under § 2244(d)(2), because it was found to be itself untimely filed under Alabama state law and procedure. Being untimely itself, the Rule 32 petition was not a "properly filed application" within the meaning of § 2244(d)(2), such that it could toll the running of the federal limitation period. *See Pace*, 125 S. Ct. at 1811-12.

By separate order, the court will GRANT the respondents' motion to dismiss the instant petition with prejudice.

DATED the 9th day of February, 2006.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
APRIL 30, 2007
THOMAS K. KAHN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06- 11841-P

DANIEL SIEBERT,

Petitioner-Appellant,

versus

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion March 7, 2007, 11th Cir., 2007, ___F.3d___).

Before: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CUCURIAM [sic]:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENITRED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

Opposition Brief Unavailable for Filming at this Time